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In the United States Court of Appeals  
for the Ninth Circuit

IYA TOGURI D'AQUINO, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*.

BRIEF FOR APPELLEE

see vol. 2604

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# In the United States Court of Appeals for the Ninth Circuit

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No. 12383

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IVA TOGURI D'AQUINO, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*.

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## BRIEF FOR APPELLEE

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### JURISDICTIONAL STATEMENT

(a) The United States District Court for the Northern District of California had jurisdiction over the appellant for the offense of treason alleged to have been committed in Japan (18 U. S. C. § 1, 1946 Ed.) because that was the Federal Judicial District into which she was first brought (18 U. S. C. § 3238, Rev. Ed.).

(b) The appellant was charged with committing treason while residing in Japan during the war. She was apprehended in Japan and brought to San Francisco directly from the Orient on an Army transport under custody of the military authorities, arriving in San Francisco, Cali-



fornia, on September 25, 1948 (2 Tr. 120, 122, 123, 134, 148, 149).<sup>1</sup>

(c) The statutory provisions involved are as follows:

Section 1, Title 18, United States Code (1946 Ed.) provides:

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

Section 3238, Title 18, United States Code (Rev. Ed.) provides:

The trial of all offenses begun or committed on the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.<sup>2</sup>

(d) This court has jurisdiction of the appeal under the provisions of Sections 1291 and 1294 of Title 28, United States Code (Rev. Ed.).

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<sup>1</sup> Pages in the printed portion of the record are designated by the letter "R" preceded by the volume number. Thus, "2 R. 464" is volume 2 of the printed record at page 464. Pages appearing in the typewritten portion of the record are designated "Tr." preceded by the volume number. Thus, "20 Tr. 2021" is volume 20 of the transcript at page 2021. Since the argument of counsel is numbered separately, reference to portions of the argument is designated by the letters "Arg." preceded by the volume number. Thus, "2 Arg. 233" is volume 2 of the argument at page 233. The Roman numerals on the transcript have been converted to Arabic for convenience and because they are not entirely correct. For example, the reporter has marked volumes 40-49 as "XXXX" where it should have been "XL."

<sup>2</sup> The revised Title 18 of the United States Code became effective on September 1, 1948. Appellant arrived in San Francisco, California, on September 25, 1948.

## STATEMENT OF THE CASE

Appellant was indicted for committing treason against the United States, the indictment alleging the commission of eight overt acts (1 R. 2-7). On September 29, 1949, she was convicted, the jury returning special findings<sup>3</sup> that the appellant had committed overt act No. 6 with an intent to betray the United States. The jury also found that she did not commit the remaining overt acts with an intent to betray the United States (1 R. 255-260). Thereafter, appellant filed motions in arrest of judgment, for judgment of acquittal, and for a new trial (1 R. 261-269), which were denied on October 6, 1949, after argument (1 R. 325-326). This is an appeal from the judgment of the court in sentencing her to be imprisoned for a period of ten years and to pay a fine of \$10,000 (1 R. 327-328). The facts presenting the questions involved are more fully set out hereafter.

## SUMMARY OF FACTS

### 1. The Indictment

On October 8, 1948, appellant was indicted in the District Court for the Northern District of California for treason (1 R. 2-7). The indictment alleged that appellant was at all times a native born citizen of, and a person owing allegiance to, the United States, and that between November 1, 1943, and August 13, 1945, she treasonably adhered to the Imperial Japanese Government and the Broadcasting Corporation of Japan, then enemies of the United States, giving them aid and comfort. The indictment charged that the adherence to the enemies of the United States by the appellant and her giving aid and comfort to them consisted

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<sup>3</sup> The jury was directed to return special findings as to each overt act because of the decision of the Supreme Court in *Cramer v. United States*, 325 U. S. 1, 36. Special findings have been utilized in *Chandler v. United States*, 171 F. 2d 921 (C. A. 1), cert. denied, 336 U. S. 918; *Gillars v. United States*, 182 F. 2d 962 (App. D.C.); *Best v. United States*, 184 F. 2d 131 (C. A. 1); *United States v. Burgman*, 87 F. Supp. 568, 89 F. Supp. 288; and in *Kawakita v. United States* (now on appeal to this court from the Southern District of California, C. A. No. 12061).

(1) of her working as radio speaker, radio announcer, radio script writer and as broadcaster of recorded music in the short wave broadcasting station of the Broadcasting Corporation of Japan which was controlled by the Japanese Government, including the preparation and composition of radio scripts, talks, and announcements, the announcing of the same and the announcing and introduction of musical recordings and talks for broadcast by radio from Japan to members of the armed forces of the United States and their Allies in the Pacific Ocean area and to people elsewhere; and (2) of her working as composer and organizer of radio broadcasting programs for subsequent broadcast by radio from Japan to members of the armed forces of the United States and their Allies in the Pacific Ocean area and to people elsewhere. It was charged that appellant's activities were intended to destroy confidence in the war effort of the United States and its Allies, to undermine and lower their military morale, to create nostalgia in the minds of the American and Allied armed forces, to create war weariness among the members of such armed forces, to discourage the members of such armed forces and to impair the capacity of the United States to wage war against its enemies (1 R. 2-5).

The indictment specified eight overt acts involving incidents of appellant's broadcasting activities all of which were charged to have been committed in the execution of the treason with treasonable intent and for the purpose and with the intent of adhering, and giving aid and comfort to enemies of the United States (1 R. 4-7).

The jury returned a verdict of guilty as charged, and returned a special finding that the appellant committed one overt act, the sixth, with an intent to betray the United States, and that she did not so commit the others (1 R. 255-260).

## 2. Venue

Appellant was apprehended at Tokyo, Japan, by the military authorities on August 26, 1948, pursuant to a war-



rant of arrest issued under the authority of the Supreme Commander for the Allied Powers to the Provost Marshal, General Headquarters, Far East Command. The warrant was issued upon the complaint and sufficient information by the Department of Justice, United States Government, that the defendant was suspected of treason (Exs. BL, EO).

Appellant left Sugamo Prison, Yokohama, Japan, in the company of and under guard of Captain John P. Prosnak, corps of military police, and WAC Captain Katherine Stull, who were acting under orders from General Headquarters, Far East Command, and was taken on board a United States Army Transport for return to the United States. Upon arrival at San Francisco on September 25, 1948, appellant was delivered to special agents of the Federal Bureau of Investigation who took her into custody. (2 Tr. 132-134, 146-149, 119-123; Exs. 12, C, D, E, F, G, H, I, BD, BM.) Appellant verified these facts and did not contradict them when she became a witness on her own behalf (47 Tr. 5236). She was arraigned before a United States Commissioner in San Francisco on September 25, 1948 (the day of arrival) at 12:30 p.m. (47 Tr. 5237).

### **3. Appellant's Citizenship**

Appellant was born in Los Angeles, California, on Independence Day (July 4) 1916, of foreign parents who had been born in Japan (Exs. 3, 4, 5, 6, 7, 15, 44 Tr. 5235). Although appellant's name had been entered in the family register in Japan shortly after her birth, it was taken off in 1932 when her father took steps to have her renounce her Japanese nationality (47 Tr. 5241-5242, 49 Tr. 5500-5501), and the loss of her Japanese nationality appears on the family register in Tokyo (47 Tr. 5255). She was a registered voter in Los Angeles and voted in the general election in 1940 (Ex. 6). On July 5, 1941, appellant went to Japan for a visit and to study medicine (44 Tr. 4912, 22 Tr. 2345). She applied for a passport as an American citizen on September 8, 1941 (Ex. 4; 44 Tr. 4922), which was

not granted because of the outbreak of war with Japan (Ex. TT). On March 30, 1942, she applied for evacuation from Japan to the United States but withdrew her request on September 2, 1942 (Ex. 7).

On April 19, 1945, she married Felipe D'Aquino (43 Tr. 4759), who was born in Tokyo and is one-quarter Portuguese blood and three-quarters Japanese blood (44 Tr. 4851-4854, 43 Tr. 4733-4736). Felipe D'Aquino claims Portuguese nationality through his grandfather and is registered as a Portuguese citizen in the Portuguese Consulate at Tokyo (2 R. 727-730, 745-747, 755-756). Appellant's marriage to Felipe D'Aquino was registered with the Portuguese Consulate at Tokyo on June 18, 1945 (2 R. 748-750) and she was registered as a Portuguese citizen in the records of the Portuguese Consulate at Tokyo (2 R. 753-755). The Portuguese Consul stated in a deposition that under Portuguese law Portuguese citizenship is conferred upon a woman who marries a male citizen of Portugal (2 R. 735-737) and that under Portuguese law appellant became a citizen of Portugal by virtue of her marriage to Felipe D'Aquino (2 R. 736).

Upon her arrival in Japan appellant obtained a resident's permit to stay in Japan (44 Tr. 4921). After the outbreak of war, appellant was visited by the Japanese police who on various occasions suggested that she obtain Japanese citizenship (44 Tr. 4933-4934). Appellant told them that she would never become a Japanese citizen (44 Tr. 4934; 45 Tr. 4966) and she did not take any steps whatsoever to become a Japanese citizen (45 Tr. 4959; 49 Tr. 5518). Appellant advised her Japanese-American friends never to change their citizenship (46 Tr. 5100) and while she was working at Radio Tokyo she told people that she was an American citizen (47 Tr. 5248).

Appellant claimed American citizenship in 1946 and 1947 (49 Tr. 5494-5498, 50 Tr. 5523, 5554) and on May 26, 1947, applied for a passport as a native citizen for return to the United States in which she swore that she had never ob-

tained naturalization in a foreign state; taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state; entered or served in the armed forces of a foreign state; accepted or performed the duties of any office, post, or employment under the government of a foreign state or voted in a political election in a foreign state or participated in an election or plebiscite to determine sovereignty over foreign territory, or made a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state (Ex. 5). Appellant also submitted to the United States Consul General a certificate from the Archives and Document Section, Home Minister's secretariat, that there was "absolutely no evidence that she had taken procedures to regain her Japanese citizenship since her arrival in Japan in 1941" (Ex. 11). She also wrote several letters to the Consular office setting forth her activities in Japan and stating that she "was always under the impression" that she was a United States citizen (Ex. 10) and that she had never recovered her Japanese citizenship but had registered with the Japanese police as an American National (Exs. 8, 9, 10). At the trial, appellant testified that she still wanted to be a United States citizen (50 Tr. 5554).

The Court charged the jury that the Government must prove appellant was an American citizen during the period of time the acts complained of in the indictment were committed; that her marriage did not in and of itself expatriate appellant, that she had the right to expatriate herself but that it must be by some voluntary act of renunciation or abandonment of American nationality and allegiance. The jury was charged that Section 401 of the Nationality Act of 1940 provided, in part, that a person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by (a) obtaining naturalization in a foreign state upon her own application, or (b) taking an oath, or making an affirmation or other formal declaration of allegiance to a foreign state. The Court also charged



that the jury could not find the appellant guilty of any treasonable act even though it should find she committed one or more of the overt acts charged in the indictment, unless it found from the evidence beyond a reasonable doubt that at the time of the commission of such act appellant was an American citizen owing allegiance to the United States (56 Tr. 5958-5963).

#### **4. Appellant's Activities Prior to November 1943**

Appellant was born in California in 1916 (Ex. 3), attended various grade and high schools in southern California (Ex. 4), and was graduated from the University of California, Los Angeles branch, in January 1940 with a bachelor of arts degree (47 Tr. 5255). She then studied for six months in the graduate school of that university, working toward a master of arts degree (47 Tr. 5256), and in the spring of 1941 she told a friend that she was interested in the study of medicine and planned on going to Japan for the purpose of attending medical school there (22 Tr. 2345), since she had relatives in Japan who were in the medical field (22 Tr. 2346).

Appellant left Los Angeles on the *Arabia Maru* on July 5, 1941, and arrived in Japan on July 24 or 25, 1941 (40 Tr. 4497). She took with her 25 or more boxes of articles including food, medicine, clothing and a sewing machine (49 Tr. 5489-5490). She attended a Japanese language and culture school in Tokyo until December 1942 (Ex. 24) and worked as a part time typist at the school until July 1942 (Ex. 24). From the summer of 1942 to the summer of 1943, appellant monitored short wave foreign broadcasts for Japan's Domei News Agency (21 Tr. 2281) but was dissatisfied with this work and sought employment at Radio Tokyo (21 Tr. 2282). In the fall of 1943, appellant went to work for the Broadcasting Corporation of Japan as a typist at a salary of 100 yen a month (Ex. 13).

In the interim appellant had made some effort toward evacuation from Japan in the spring of 1942, but finally

waived and abandoned her request to return to the United States. This waiver was executed in writing under date of September 2, 1942, and is quoted in *haec verba* as follows: "I hereby wish to express my wish to remain in Japan for the present, and hereby withdraw my request to be evacuated" (Ex. 7). Appellant was not particularly interested in returning to the United States because she felt that she might be interned in a detention center if she returned here (40 Tr. 4538-9; Ex. 68).

In the fall of 1943 appellant embarked upon her broadcasting career for the Broadcasting Corporation of Japan (10 Tr. 907). Several times during her employment as broadcaster she sought and obtained pay raises (9 Tr. 665; 10 Tr. 934; 25 Tr. 2795, 2796), and at the conclusion of her career she was receiving the sum of 180 yen a month (Ex. 13), which was about the same pay as that of her superiors (9 Tr. 660). In addition, from January 1944 to May 1945 she received 150 to 160 yen per month for secretarial work at the Danish Legation (2 R. 807). In the spring of 1945 she married Philip D'Aquino, who was employed at Domei News Agency at a salary of 100 yen per month (44 Tr. 4855).

## **5. Governmental Control of the Broadcasting Corporation of Japan**

The Broadcasting Corporation of Japan was a non-profit corporation (10 Tr. 898; 11 Tr. 1013) which was required to obtain the approval of the Ministry of Communications of the Japanese Government for all expenditures for equipment (13 Tr. 1329), for the corporate budget (13 Tr. 1331), for all dispositions of corporate funds (13 Tr. 1330, 1332) and the settlement of accounts (13 Tr. 1331). During the period set forth in the indictment (November 1943-August 1945) the Ministry of Communications authorized the collection of license fees from all listeners and owners of radio receiving sets (10 Tr. 898; 13 Tr. 1328). The Ministry of Communications was required to authorize the organization

of offices and the resignation and appointment of all executive officers (13 Tr. 1332).

The Broadcasting Corporation of Japan (Radio Tokyo) was controlled by the Imperial Japanese Government through six governmental agencies: the Communications Ministry, the Foreign Affairs Ministry, the Ministry of Greater East Asia, the Board of Information, the Army General Staff, and the Navy General Staff (10 Tr. 898-899), and was the principal channel used by the Government for the dissemination of propaganda (4 Tr. 245).

The Broadcasting Corporation of Japan was divided into three bureaus: the Technical Bureau, the Domestic Bureau, and the Overseas Bureau (10 Tr. 899), and was charged with the responsibility for all short wave broadcasts emanating from Japan (10 Tr. 900). The Overseas Bureau consisted of five departments: the Business Department, the Editorial Department, the European Continent Department, the Asiatic Continent Department, and the American Continent Department (10 Tr. 901). The American Continent Department was itself divided into five sections: the News Section, the Announcers Section, the Latin American Section, the Special Features Section, and the Front Line Section (10 Tr. 902). The Front Line Section was in charge of all short-wave broadcasts beamed to Allied troops in the South Pacific ocean area, and the "Zero Hour" program, on which appellant broadcast, was its responsibility (10 Tr. 903).

The eighth section of the Bureau of Information was under the control of the Imperial Japanese Army, headed by Colonel Isao Takeda and his deputy, Lieutenant Colonel Shigetsugu Tsuneishi (3 Tr. 233-234). This section of the Bureau of Information was concerned with broadcasting propaganda designed to weaken the will of Allied troops to fight (3 Tr. 236-239; 4 Tr. 241, 243). Lieutenant Colonel Tsuneishi was a member of the governmental committee on overseas broadcasts, composed of representatives from the Cabinet, the Greater East Asia Bureau, the Army, the

Navy, the Department of Communications, and the Department of the Interior (4 Tr. 241-242).<sup>4</sup> Its object was to coordinate broadcasts and information concerning the war (4 Tr. 242).

Lieutenant Colonel Tsuneishi was in charge of and supervised the arrangement of a program known as the "Zero Hour" (4 Tr. 241, 277), the governmental and official purpose of which was to broadcast propaganda (4 Tr. 241, 244). This was to be effected by broadcasting music, news, and commentaries containing propaganda to Allied GI's (4 Tr. 243). The "Zero Hour" was used as an instrument of psychological warfare by broadcasting to the Allied troops in an endeavor to cause them to be homesick and to be tired of or disgusted with the war (4 Tr. 244-245; 9 Tr. 739-740; 10 Tr. 905-929), and persons working on that program were considered essential to the Japanese defense effort (9 Tr. 732-733).

The "Zero Hour" broadcasts were carried by cable from the broadcasting studios in Tokyo to the transmitting towers at Nazaki, Yamata, and Kawachi (22 Tr. 2356), which were equipped with directional antennae for the purpose of sending strong waves in a desired direction (22 Tr. 2372). The broadcasting equipment at Radio Tokyo was of the highest quality (22 Tr. 2357), and from 1943 to 1945 was in good condition (22 Tr. 2350). The cables to the transmitters and the transmitting apparatus at Nazaki, Yamata, and Kawachi were in excellent condition from a scientific standpoint during the years from 1943 to 1945 (22 Tr. 2357, 2368).<sup>5</sup> The "Zero Hour" program was beamed to Allied troops in the South Pacific ocean area as disclosed by the azimuthal maps introduced in evidence through the testimony of experts (Exs. 40, 41, 42, 43).

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<sup>4</sup> Appellant introduced evidence through her own witness on direct examination that the Zero Hour was under the jurisdiction of Imperial Japanese Army Headquarters at Tokyo (32 Tr. 3633).

<sup>5</sup> For pictures of the broadcasting equipment, see exhibits 27, 28, 29, 31, 32, 33, 35, and 38. For a picture of the Nazaki transmitter, see exhibit 34.



## 6. The Purpose of the Zero Hour Program

In the early fall of 1943, while appellant was working as a typist at Radio Tokyo (11 Tr. 1081), the Japanese Army General Staff conceived the idea of expanding a twenty-minute program of American dance music known as the "Zero Hour" into a new program of one-hour duration, with the same name (9 Tr. 709-718; 11 Tr. 1061-1063), and were interested in securing a new voice, preferably a female whose voice was unknown to radio listeners and not stereotyped, to be used on this program (14 Tr. 1435). Appellant was given a voice test (11 Tr. 1089) and she possessed a very rich and charming radio voice (25 Tr. 2746; 40 Tr. 4462, 4478) which was especially suited for use on the Zero Hour because it would be appealing to American fighting men (12 Tr. 1102). In November 1943, appellant was told by George Mitsushio, who was to be responsible for the expanded program (10 Tr. 897), that she was to participate in a special type of program in which the personnel of the program would devote themselves solely to the preparation and broadcasting of propaganda material to be beamed by radio to the American armed forces in the South Pacific area for the purpose of bringing about a feeling of homesickness, nostalgia, and war weariness among the troops (10 Tr. 908-910). A few months later she was again told about the purpose of the program (9 Tr. 661-663; 10 Tr. 911-914). Appellant was told that she was to prepare scripts and broadcast on this program (10 Tr. 910). Appellant admitted knowing that she was to be a broadcaster on a propaganda program (14 Tr. 1424), and testified that she knew that the foregoing was the governmental purpose of the Zero Hour program (47 Tr. 5306, 5308, 5309).<sup>6</sup>

In March 1944 the Front Line Section was formed at Radio Tokyo to take over the responsibility of the Zero

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<sup>6</sup> Appellant's witness Reyes testified that the purposes of the Zero Hour program had been explained to appellant and that she knew what they were (33 Tr. 3789-3790).

Hour program (12 Tr. 1124, 1129) and a meeting was held by Mitsushio at which appellant and other participants on the Zero Hour were present (10 Tr. 911; 12 Tr. 1125-1128). The purpose of this meeting was to give instructions to the personnel of the newly created Front Line Section (10 Tr. 912). On this occasion appellant was told that the Zero Hour had become expanded into what was a large program and was to be administered by the Front Line section (10 Tr. 912), that her superiors felt that this type of broadcast to the Allied troops was becoming increasingly important (10 Tr. 912). Appellant and others were told that the work of the Front Line Section was to be devoted solely to preparation of scripts and programs and to broadcasting to the American fighting forces in the South Pacific, and that some of the material would be supplied by the Japanese Army General Staff (10 Tr. 912; 12 Tr. 1129). It was explained that the program was to be one of the psychological weapons of the Japanese armed forces (10 Tr. 913; 12 Tr. 1130), that the purpose was to create an audience among the American soldiers in the South Pacific by putting on a very good entertainment program (9 Tr. 662; 10 Tr. 914; 12 Tr. 1130-1131) and, once their attention was captured, to broadcast propaganda which would lower the morale of American soldiers, make them homesick, war weary, and discouraged (9 Tr. 662; 10 Tr. 911-914; 12 Tr. 1130).

In the spring of 1944 at a luncheon in Tokyo attended by appellant and other members of the Zero Hour program, Lieutenant Colonel Tsuneishi told them that the war was not going well for Japan and that the Zero Hour program was becoming more important strategically because of the continuous American landings on Pacific islands (9 Tr. 663-664; 10 Tr. 917; 4 Tr. 247). Tsuneishi informed the group that the Zero Hour programs were successful and asked them to continue their best efforts in that work (4 Tr. 247; 9 Tr. 663; 10 Tr. 917).

Appellant admitted that no physical force, compulsion, duress, coercion, pressure or threat thereof was exerted upon her by the Japanese or anyone else to compel her to take the broadcasting position at Radio Tokyo or to continue in that job (47 Tr. 5289-5290; 48 Tr. 5332-5337; 49 Tr. 5502-5504; Ex. 24).

Appellant testified that she knew that the Zero Hour program was propaganda (47 Tr. 5308) and that its purpose was to lower morale of American troops (47 Tr. 5309). She admitted knowing that the program was designed to create homesickness, nostalgia, and war weariness among those soldiers (47 Tr. 5306-5307) and that the Broadcasting Corporation of Japan was under the domination of the Japanese Army General Headquarters (47 Tr. 5313). Nonetheless, she stated that she was glad to have had the opportunity to learn broadcasting work and technique (47 Tr. 5317).

She also told others that she accepted the broadcasting job and liked it because it paid more than a typist received (7 Tr. 487; 14 Tr. 1405; Ex. 68), the work hours were shorter (Ex. 68), the work more interesting (14 Tr. 1405; 40 Tr. 4531, 4532), the contacts and surroundings were enjoyable, and she thought she might be able to find a future in radio work (14 Tr. 1405). Moreover, appellant did not like to type (13 Tr. 1362) and admitted on the witness stand that she found her work on the radio was interesting (48 Tr. 5361). She was a good and efficient announcer (24 Tr. 2546) who read scripts intelligently and whose work was good (33 Tr. 3792, 3802). After the war appellant told newspaper correspondents that compared to the work of other girls at the studio she felt her work was comparatively easy (7 Tr. 487), that her experience on the air had been educational in that she had learned radio and microphone technique and that she was thrilled on hearing the recording of her own voice (7 Tr. 488). Appellant's husband had warned her several times to stop broadcasting

but she felt that "you can't just quit" (7 Tr. 488; 44 Tr. 4878, 4905, 4906, 4907).

Appellant was not trusted by two of the American prisoners of war who worked with her on the Zero Hour and who testified on her behalf as defense witnesses. The American Army officer Wallace E. Ince testified that at the time appellant was recruited as a broadcaster, he did not want to include her in the program because he did not trust her and that he never told her of an agreement between Reyes, Cousens and himself to frustrate the Japanese propaganda effort because he did not trust the appellant (31 Tr. 3532-3533, 3550-3551). Norman Reyes, also a prisoner of war who testified for appellant, had previously given statements to the Federal Bureau of Investigation agents that "he did not trust her, (appellant) having gained the impression that she was pro-Japanese" and that the only agreement between Ince, Cousens and himself was the one to plead duress after the war so that nothing would happen to them. He affirmed the truth of the above statements on cross-examination (33 Tr. 3745-3746, 3785-3787).

Although appellant was absent from her work on certain occasions in 1944, she was not disciplined by the Japanese as a result of the absences and in fact received a raise in pay shortly thereafter (44 Tr. 4888). In the spring of 1945 she was again absent for a period in excess of one month, and she ignored a card requesting her to return to work (44 Tr. 4858-4859). According to her own testimony, she was never jailed, assaulted, beaten, whipped or ill-treated by the Japanese police (47 Tr. 5290-5291). Appellant's co-workers among the Japanese employed at Radio Tokyo testified that they did not observe any duress, coercion, or compulsion being exercised upon or against the appellant (24 Tr. 2510, 2542, 2548; 25 Tr. 2752, 2753, 2684, 2685).



## 7. Appellant's Compensation

Appellant received 180 yen a month for her part-time afternoon work at Radio Tokyo (Ex. 13), which was in addition to compensation she received from other sources. At first she received 130 yen a month while employed at Domei News Agency (49 Tr. 5482), and later, when employed as stenographer by the Danish Legation, she was paid 150 yen a month until July 1944 and then 160 a month until May 1945, with a bonus of an extra month's salary on New Years (2 R. 807). Her husband earned 100 yen a month as a linotype operator (44 Tr. 4855). Her salary at Radio Tokyo and her salary from the Danish Legation were each in excess of the compensation received by her fellow employees for full-time work at Radio Tokyo. For example: Igarashi, a Japanese announcer at Radio Tokyo, never received more than 120 yen a month in return for his services there (24 Tr. 2607); Kenkichi Oki, who was the production supervisor of the Zero Hour program, received approximately 120 yen a month in 1943 and 140 yen a month in 1944 as remuneration for his services as supervisor (9 Tr. 660); Moriyama, a staff member of the Zero Hour production unit working as such three hours a day for six days a week, received 150 yen a month as remuneration for said work (24 Tr. 2544-1545); Chiyeko Ito, appellant's Nisei friend, received the sum of 125 yen per month as compensation for her services as typist and linotype operator (40 Tr. 4533).

## 8. Appellant's Participation in the Zero Hour Program

The Zero Hour was a "live" program (19 Tr. 1957) of one hour duration<sup>7</sup> (Exs. 25, 63, 75; 9 Tr. 751; 11 Tr. 1062, 1088; 24 Tr. 2520), originating at Radio Tokyo and broadcast between 6 and 7 p. m. (9 Tr. 782; 32 Tr. 3602-3603; Ex.

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<sup>7</sup> Appellant and defense witness Cousens and Ince testified that the program was 1 hour and 15 minutes and was broadcast between 6 and 7:15 p. m. Tokyo time (29 Tr. 3204; 31 Tr. 3475; 45 Tr. 5000).

63, 75) six days a week (12 Tr. 1152; 45 Tr. 5017). From November 1943 to May 1944 appellant appeared on this program every night and from May 1944 until late August 1945 she worked five days a week (45 Tr. 5017; 9 Tr. 756-757; 12 Tr. 1152; 24 Tr. 2546) broadcasting under the radio pseudonym of "Ann" and "Orphan Ann" (12 Tr. 1254; 45 Tr. 5008-5010, 52 Tr. 5847; Exs. 25, 63, 75).<sup>8</sup> Although the program had several formats (31 Tr. 3477) it consisted of a mixture of news announcements, musical recordings, and commentaries (29 Tr. 3205-3207; 45 Tr. 5001; Exs. 23, 25, 63, 75).<sup>9</sup> Appellant's duties consisted of playing recordings of light classical and popular American songs of a sentimental nature (45 Tr. 5002, 5004; Exs. 25, 63) interspersed with brief comments and remarks addressed to American troops (10 Tr. 924-925; 12 Tr. 1131, 1140-1142; 24 Tr. 2537, 2538, 2539, 2506, 2533, 2552, 2619-2620; 32 Tr. 3613; Ex. 23, 25). These remarks were of a character designed to make the soldiers think of their loved ones at home (24 Tr. 2552; 25 Tr. 2750, 2790), their former happiness as compared with their present plight (25 Tr. 2752; Ex. 15), to instill doubt about the faithfulness of their wives and sweethearts (25 Tr. 2664; 7 Tr. 486), to make them envious and resentful of the workers back home (18 Tr. 1877), to make them apprehensive of their military position (18 Tr. 1882), to create in their minds the idea that the fight against the Japanese was futile (18 Tr. 1880), and to induce them to stop fighting (25 Tr. 2682-2684; 18 Tr. 1881).

The news and commentaries broadcast preceding and following appellant's appearance at the microphone were

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<sup>8</sup> Appellant testified that she was absent on certain occasions due to illness, her marriage and other reasons (45 Tr. 5065-5072).

<sup>9</sup> According to one defense witness, at one time the program consisted of 10 minutes of POW messages, 10 minutes of introduction, 10 minutes of music introduced by appellant, 10 minutes of American home front news, 10 minutes of music introduced by appellant, 15 minutes of dance music introduced by Normando Reyes, 10 minutes of news highlights, 4 minutes of news commentaries, sign off (29 Tr. 3205-3207). Appellant's description of the program was substantially the same (45 Tr. 5001-5006; Ex. 15).

propaganda of a high order calculated to undermine the morale and confidence of American soldiers on the fighting fronts (Exs. 15, 63, 75; 17 Tr. 1828-1832; 33 Tr. 3791-3792, 3810). News reports dealt with intense Japanese resistance on all fronts, reports of American and Allied losses of ships and men, and were worded in such a manner as to encourage the belief that the Japanese were exacting terrific losses in return for any gain by the Allied powers (Exs. 15, 63, 75; 10 Tr. 930-931; 34 Tr. 3859, 3860-3861). Commentaries were written in such a manner as to encourage grave doubt about the veracity of American announcements concerning military operations and to cast suspicion upon our military and civilian leaders (Ex. 75).

Specific remarks and comments made by appellant during her broadcasts on the Zero Hour were heard and remembered by some of her Japanese co-workers at Radio Tokyo and by American soldiers and sailors who had served in the South Pacific and were able to identify appellant's voice. Appellant also related to war correspondents and others some of the things she had said while working as a broadcaster.

#### **(a) Witnesses at Radio Tokyo.**

In November or December 1944, a radio announcer named Igarashi (24 Tr. 2605), whose salary was less than that of appellant (24 Tr. 2607), heard her say, in substance, "The Americans claim that your ships were not sunk by the Japanese but the fact is that your ships were sunk by the Japanese, and you have no ships" (24 Tr. 2619; 25 Tr. 2662). On another occasion between January and March 1945 he heard her broadcast, in substance:

Your sweethearts and folks are waiting for you back in the United States, so why not stop fighting and go back to the states and enjoy life? [25 Tr. 2664.]

Villarin, a Filipino who had been captured at Bataan and taken to Tokyo as a student for indoctrination (26 Tr. 2850), visited Radio Tokyo a number of times and met ap-

pellant (26 Tr. 2852, 2854). On two occasions he observed appellant's broadcast through an open studio door at a distance of about twelve feet (26 Tr. 2852, 2854). On the first occasion in March 1944 he heard and saw her say in substance, "Hello Honorable Enemy. Why do you have to stay in the foxholes of New Guinea when your girl friends back home are running around with other men? It is about time you fellows went back home" (26 Tr. 2853). In May 1944, under the same circumstances, Villarin observed appellant while she was broadcasting and heard her say, in substance, "You are wasting your time in the South Pacific when you could have fun back home" (26 Tr. 2855-2856). Villarin recorded this incident in his diary (26 Tr. 2854).

A censor named Notomu Nii (25 Tr. 2678), who was in the studio while appellant was broadcasting, heard her say, in substance, to the troops, "Why don't you stop fighting and listen to good music?" (25 Tr. 2682). On another occasion he was present when she broadcast, in substance, "Why don't you go back to your loved ones in the states instead of fighting in the jungles with mosquitoes from foxholes" (25 Tr. 2684).

A former typist at Radio Tokyo recalled hearing appellant make frequent mention of the wives and sweethearts of American fighting men in her broadcasts (25 Tr. 2790). In the fall of 1944 she heard appellant say in substance, over the air, on three different occasions, "How are you boys in the Southwest Pacific? Are you having a good time with the girls on the Islands?" (25 Tr. 2749); "Do you miss your wives and sweethearts in the states?" (25 Tr. 2750); and "Don't you miss eating ice cream and listening to the juke boxes in the states?" (25 Tr. 2752).

Harris Sugiyama, a staff announcer at Radio Tokyo, heard appellant's broadcasts over the monitoring system (24 Tr. 2502-2503) and heard appellant say, in substance, "This is Orphan Ann. You must be lonely out there. Let me cheer you up with some music" (24 Tr. 2506). He also



heard her say, "It is very uncomfortable out there" (24 Tr. 2508). Sugiyama related that "the whole theme of this program was to bring out nostalgia" but he was unable positively to recall other remarks of appellant, although some sounded familiar to him (24 Tr. 2533, 2537-2538).

In the fall of 1944 George Mitsushio, chief of the Front Line Section, advised appellant that Japanese Army Intelligence had received reports to the effect that an American contingent had landed on one of the smaller islands in the South Pacific and were without water, and that his superiors at the Radio Station thought that it would be a good idea to utilize this incident on the Zero Hour program. Appellant consented to allude to this incident as a part of her regular broadcasts to the American troops, typed out a script on this matter and broadcast it. She said in substance, "O. K. Sarge, leave out the beer. Let's have some cold water. Cold water sure tastes good." Appellant repeated these words in subsequent broadcasts on at least two other occasions (10 Tr. 920-925).

Normando Reyes, a defense witness who worked on the Zero Hour with appellant, testified that on Armistice Day 1944 she broadcast that "it was time to forget about the war and remember the dead" (33 Tr. 3804-3805). Reyes also heard appellant broadcast the remarks about cold water tasting good (33 Tr. 3806, 3807).

#### **(b) American Listener Witnesses**

Exhibits 16-21 were recordings of certain Zero Hour programs which had been monitored by the Federal Communications Commission at Portland, Oregon, for a short time (16 Tr. 1627, 1638, 1646, 1691, 1694; 17 Tr. 1729, 1762-1763). Appellant's voice was on these recordings (9 Tr. 688-696a; 10 Tr. 925-946; 18 Tr. 1871-1874, 1875; 19 Tr. 1956-1970), a fact which she admitted at the trial (48 Tr. 5382).<sup>10</sup> The recordings were played in the presence of the

<sup>10</sup> For written transcript of the context of these recordings see Exhibit 25.

court and jury and members of the press through the media of playback equipment and with the use of earphones which were used for the sole purpose of improving courtroom reception and audibility (17 Tr. 1774; 18 Tr. 1954). The Zero Hour program was not nearly as audible to radio listeners in the United States as it was to the troops in the South Pacific to whom the program was beamed (17 Tr. 1772).

Gilbert Velasquez met appellant in 1927 and until 1938 frequently purchased candy from her at her family store (18 Tr. 1867-1869). In 1938 he moved away but still visited the store, made purchases, and talked to appellant about twice a month (18 Tr. 1870-1871). He was familiar with appellant's voice and positively identified it on Exhibits 16-21 (18 Tr. 1871-1875). In 1942 he was drafted into the Army (18 Tr. 1871) and while serving in the South Pacific he heard appellant's voice over the radio (18 Tr. 1875). In September 1944 he heard a broadcast in which appellant said in substance, "Joe Brown was out with Sally Smith. He is a rejectee who is getting the cream of the crop while you Joes are out there knocking yourselves out" (18 Tr. 1877). In November or December 1944 when he was on Leyte he heard her say over the radio in substance, "What are your wives and sweethearts doing?" and "Wouldn't it be nice to be home now, driving down to the park and parking and listening to the radio a while" (18 Tr. 1879). In February or March 1945 while he was still on Leyte he heard appellant broadcast to the troops in substance: "Why don't you kick in now? There's no hope. You can be treated right by the Japanese people. When the Japanese finally take over they are not going to be hard on you" (18 Tr. 1880). In December 1944, Velasquez heard her broadcast, in substance, that "the Japanese were kicking hell out of the American troops in Tacloban, and that by New Year's Day the Japanese would be in Palau" (18 Tr. 1882). Appellant also said over the air, "There is no sense in being out there in those mosquito

infested islands, perhaps getting yourselves killed” (18 Tr. 1881).

Richard Henschel, a former signal corps officer, who interviewed appellant in the fall of 1945 (26 Tr. 2950) and whose work in producing phonograph records trained him in voice recognition (26 Tr. 2954), identified appellant's voice as one which he heard over the radio when he was in the South Pacific in 1944 and 1945 (26 Tr. 2955). He heard appellant address the troops as “Boneheads,” “Dopes” and “Orphans” (26 Tr. 2964), and on one occasion heard her say that “the Japanese Imperial Command knew that there was a large convoy of ships steaming northward from New Guinea, and that the Japanese knew where they were going and had a big surprise for the personnel on board” (26 Tr. 2959-2960). In the fall of 1944 while at Tacloban, Leyte Gulf, Henschel heard her broadcast about the loss of ships (26 Tr. 2962).<sup>11</sup>

Between August 1944 and September 1945, Jules I. Sutter, a former signal corps officer, listened to the Zero Hour program two or three times a week and was able to identify appellant's voice on Exhibits 16-21 as being the voice of Orphan Ann whom he had heard on the Zero Hour. In September 1944, when the witness was on Saipan, appellant broadcast that, “The Island of Saipan was mined with high explosives, and that the Americans would be given forty-eight hours to clear off the island, and that if they did not, the island would be blown sky high” (20 Tr. 2028). In the fall of 1944 when Sutter was still on the Island of Saipan he heard appellant broadcast in substance as follows: “Well, are you homesick? How would you like to be sitting on your front porches right now?” (20 Tr. 2029). After a musical number was played appellant would say in substance over the radio, “Well, now wasn't that nice? How would you like to be dancing with your wife or girl

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<sup>11</sup> Since this testimony was corroborative of the eyewitness testimony relating to overt act 6 upon which appellant was convicted, it is detailed herein pp. 26-29.

friend to that number?" (20 Tr. 2029). In the early spring of 1945 appellant was heard by Sutter to say over the air: "I wonder who your wives and girl friends are out with tonight? Maybe a 4F. Maybe someone working in a war plant making big money, while you are out here fighting, knowing you can't succeed" (20 Tr. 2029). In March or April 1945, Sutter heard her say on the radio, in substance, "How would you like to be sitting down to a nice big thick steak with all the trimmings" (20 Tr. 2029). Sutter particularly remembered the last statement, because at the time the only meat he and his companions in arms had partaken of for several weeks was strong New Zealand mutton (20 Tr. 2030). In the late spring of 1945 Sutter heard appellant say, in signing off the Zero Hour program: "Well, fellows I have to be going now. I am going to get my loving tonight. How about you?" (20 Tr. 2030).

Lieutenant Colonel Ted Sherdeman (19 Tr. 1971), who had been in radio work for twenty years as an announcer and as a manager of radio stations (19 Tr. 1975), was an officer in charge of the Armed Forces Radio Service, and assigned to the Information and Education Section, a special staff section attached to Headquarters United States Army Forces Far East (19 Tr. 1971, 1975).

One of his duties was to make a staff study of what the Japanese radio was doing (19 Tr. 1973). He had listened to "Orphan Ann" on the Zero Hour program (19 Tr. 1974) and identified appellant's voice on Exhibits 16 to 21, inclusive (19 Tr. 1976, 1977). In the winter of 1944 he heard appellant say over the air, in substance "wouldn't this be a nice night to be parked in your car with your girl and to turn on the radio?" (19 Tr. 1977). In June 1944 while at Milne Bay he heard her identify herself over the radio as "Ann, your friendly enemy" (19 Tr. 1978), and say: "Wouldn't this be a nice night to go down to the cool corner drug store and have an ice cream soda?" (19 Tr. 1979). Late in June 1944, when in the Admiralty Islands, he listened to Radio Tokyo and heard appellant say: "Wouldn't



you California boys like to be at the Cocoanut Grove tonight with your best girl? You have plenty of cocoanut groves but no best girls" (19 Tr. 1979).

Marshall Hoot, a former U. S. Naval Chief Boatswain's mate, identified appellant's voice on Exhibits 16-21 as that of Orphan Ann on the Zero Hour whom he heard over the radio while patrolling around the Gilbert Islands (20 Tr. 2110-2116, 2133-2136). Hoot had been alerted by Navy Intelligence to listen to the Zero Hour program (21 Tr. 2172, 2206, 2207-2209) and also knew through Intelligence and other sources that Orphan Ann and "Tokyo Rose" were one and the same (21 Tr. 2206-2207, 2189-2190). Appellant was described as "razzing us fellows out here in the Pacific telling how well Japan is getting along, and to hear her start out you would think that she was broadcasting from the United States and sorry that we were losing (sic) so many men and ships, it sure makes the fellows sore" (21 Tr. 2204, Ex. 26). Notes on the Zero Hour program were entered in the ship's log (21 Tr. 2172-2172a).<sup>12</sup> In the middle of February 1944, Hoot heard appellant say, "Wake up you boneheads. Why don't you see your commanding officer and demand to be sent home? Don't stay out in that stinking mosquito infested jungle and let someone else run off with your girl friend" (20 Tr. 2118; 21 Tr. 2165). In the latter part of the same month she broadcast, "You boneheads—if you boneheads want to go home, you had better leave soon. Haven't you heard? Your fleet is practically sunk" (20 Tr. 2118-2119; 21 Tr. 2165). On another occasion (early February 1944) she said, "You know the boys at home are making the big money and they can well afford to take your girl friends out and show them a good time" (20 Tr. 2117-2118). Hoot also heard other broadcasts by appellant which were designed to create homesickness and nostalgia (20 Tr. 2117).

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<sup>12</sup> The vessel was later sunk by enemy action and witness did not know what became of the log (21 Tr. 2172).

William Thompson, a former marine, listened to Exhibits 16-21 and identified appellant's voice thereon as the voice of Orphan Ann which he had heard on the Zero Hour program from Radio Tokyo while he was in the South Pacific (21 Tr. 2243-2250). Between December 1943 and March 1944, while he was at Cape Gloucester, New Britain, Thompson heard appellant, broadcasting as Ann, say in substance, "Welcome to the First Marine Division, the bloody butchers of Guadalcanal, who have just landed on Cape Gloucester, New Britain" (21 Tr. 2251-2252); "Just imagine yourself with your best girl in a drivein in Southern California. You could be there if you would only give up this fruitless fight" (21 Tr. 2252), and that "the wives and sweethearts were leaving the men, service men, because you are overseas too long" (21 Tr. 2253).

Other American veterans who identified appellant's voice on the recordings testified as to propaganda which they heard broadcast by appellant. Sam Cavnar heard appellant broadcast to the fighting men in an endeavor to make them homesick (21 Tr. 2226). David Gilmore, a former marine, heard appellant stress the favorable living conditions of the civilians at home (23 Tr. 2459), and Sergeant Charles F. Hall testified concerning her broadcast of knowledge of secret troop movements (26 Tr. 2896, 2897, 2899, 2902, 2904) and her broadcasts designed to inculcate homesickness and nostalgia (26 Tr. 2892).

**(c) Appellant's Admissions Concerning the Nature of Her Broadcasts**

Shortly prior to Japan's surrender, the radio scripts at Radio Tokyo were burned but appellant retained about twenty-five of her own scripts (49 Tr. 5400), most of which she autographed as "Tokyo Rose" and gave voluntarily to Army Intelligence officers, war correspondents, and Army Signal Corps men after the termination of hostilities (Exhibits 22, 23, 44, 74; 13 Tr. 1356; 14 Tr. 1465; 26 Tr. 2823; 48 Tr. 5354). She also used the cognomen "To-

kyo Rose" on other documents (Exs. 2, 14), and told one of her own witnesses that she knew she had been referred to as "Tokyo Rose" but felt that she was not the only one (40 Tr. 4493).

Upon being interviewed by a war correspondent, she admitted broadcasting to the troops that "their sweethearts were unfaithful to them and that their wives were out dancing with other men while they were fighting in the muck and jungle" (7 Tr. 486). On another occasion she told a special agent of the Army Counter Intelligence Corps that in announcing various musical recordings she would call the troops "boneheads" and would refer to the fact that they were "battling" mosquitoes (14 Tr. 1436). Appellant said she identified herself as "Ann" or "Orphan Ann" over the air (14 Tr. 1437) and when introducing a musical recording like "Stardust" would say "Do you remember when you were home dancing with your wife or with your girl friend to the tune of 'Stardust'? I wonder what she is doing now?" (14 Tr. 1436).

Appellant told Clark Lee, a war correspondent, that in the fall of 1944 at the time that Japan claimed they had sunk a number of American ships off Formosa a Major from Imperial Headquarters suggested that she broadcast the following words: "Orphans of the Pacific, you really are orphans now. How are you going to get home now that all of your ships are sunk?" Appellant told Lee that she broadcast those words (7 Tr. 485-486).

Appellant also testified that the Japanese did not check her scripts every day and did not make her record the program before it was broadcast (49 Tr. 5458).

## 9. The Overt Acts

Eight overt acts of treason were charged in the indictment. Overt Acts 1 and 2 involved discussions between appellant and others concerning proposed broadcasts. Overt Acts 5 and 7 involved the preparation of scripts by appellant for subsequent radio broadcasts. Overt Acts, 3, 4, 6

and 8 involved radio broadcasts made by appellant (1 R. 5-6).

All overt acts were submitted to the jury which returned special findings that appellant had committed Overt Act 6 with an intent to betray the United States (1 R. 255-260).

Overt Act 6 alleged that on a day in October 1944 the appellant at Tokyo, Japan, in a broadcasting studio of the Broadcasting Corporation of Japan, did speak into a microphone concerning the loss of ships (1 R. 6-7).

The Government witnesses who testified regarding appellant's commission of Overt Act 6 were Kenkichi Oki, George Mitsushio, and Satoshi Nakamura (9 Tr. 681-682; 11 Tr. 974-976; 21 Tr. 2293-2301). Mitsushio and Oki were American born Japanese who acquired Japanese nationality and who became, respectively, Chief of the Front Line Section and Production Chief of the Zero Hour (9 Tr. 658-659; 10 Tr. 896-897). Mitsushio was responsible for the Zero Hour broadcast and was appellant's superior. In the fall of 1943, when appellant was accepted as a broadcaster for the Zero Hour program, she was told by Mitsushio that she was going to participate in a program beamed to the American Forces in the South Pacific and that its purpose was to bring about homesickness, nostalgia and war-weariness among the American fighting forces (10 Tr. 908-910). In March 1944 Mitsushio explained to the personnel of the Front Line Section, including appellant and Kenkichi Oki, that the purpose of the Zero Hour program was to create an audience among the American soldiers in the South Pacific and to broadcast propaganda designed to lower their morale, create war weariness, make them homesick, and discourage them in their fight against the Japanese (9 Tr. 661-663; 10 Tr. 911-914).

In October 1944 Mitsushio told appellant that he had a release from Imperial General Headquarters giving the results of American ship losses in one of the Leyte Gulf battles. He requested appellant to allude to these losses



in her part of the program and she agreed to do so (11 Tr. 971). Shortly thereafter Oki and Mitsushio observed appellant type a script about the loss of ships. Mitsushio received a copy of the script and noticed that she had made reference to the news announcement of the ship losses (9 Tr. 677-681; 11 Tr. 971-974). Shortly after 6 p. m. that evening appellant was present in the Broadcasting Studio of the Broadcasting Corporation of Japan in Tokyo, Japan, together with Mitsushio, Oki, and Nakamura, a Canadian-born Japanese who was master of ceremonies on the Zero Hour program. Appellant was present in the studio when the news announcer broadcast that the Americans had lost many ships in the battle of Leyte Gulf and immediately thereafter she was introduced to the radio audience by Nakamura (21 Tr. 2297-2299). Oki, Mitsushio, and Nakamura saw her speak into the microphone and heard her say, in substance: "Now you fellows have lost all your ships. You really are orphans of the Pacific. Now, how do you think you will ever get home?" (9 Tr. 681-682; 11 Tr. 974-976; 21 Tr. 2288-2289; 21 Tr. 2293-2301).

Richard Henschel, a former officer in the Signal Corps, who, because of employment in the recording business, was experienced in voice intonation, inflection, quality and comparison (26 Tr. 2953-2954), listened to appellant during an interview by war correspondents at Tokyo in September 1945 (26 Tr. 2948-2950). Henschel identified appellant's voice as that recorded on Exhibits 16 to 21, and as that of a person broadcasting as Ann which he frequently had heard over the radio in the South Pacific (26 Tr. 2951-2952, 2953, 2955-2956). On October 24th, 25th or 26th, 1944, Henschel was listening to a radio broadcast from Tokyo while he was in Tacloban, Leyte, and heard a voice which he identified as that of appellant say that "the Americans had lost all their ships in the battle of Leyte Gulf and that they were stranded in the Philippines and didn't know how they would get home" (26 Tr. 2960-2964).

Robert Cowan, a television producer and director, who as an Army sergeant talked to appellant and made a sound movie of her in October 1945, listened to Exhibits 16-21 and identified the voice of Ann and Orphan Ann recorded thereon as that of the appellant (26 Tr. 2809-2815, 2816). In the latter part of October 1944, at Orange Beach on the island of Leyte, Cowan was listening to a radio broadcast in the early evening and heard a voice which he identified as that of the appellant (26 Tr. 2816, 2818-2820). On that occasion Cowan heard appellant say, in substance, "You have been deserted. Your ships have left you. You will be driven back into the sea and annihilated by the Imperial Japanese Army and the Navy" (26 Tr. 2820).

## ARGUMENT

### I

#### **The Nationality Act of 1940 Did Not Nullify the Application of the Treason Statute to the Appellant**

Appellant contends (Br. pp. 37-49) that, since the Nationality Act of 1940 permits a United States citizen to surrender his citizenship and adopt that of an enemy nation, the application of the Treason Statute (18 U. S. C. Sec. 1) to the appellant violates the due process clause of the Fifth Amendment and is also unconstitutional under the treason clause of the Constitution (Art. III, Sec. 3). Her argument is that, since American citizens residing in Japan could become naturalized citizens of Japan while it was at war with this country and thereafter actively assist that country in its war against the United States without violating the treason statute, she was denied equal protection of the laws and subjected to discrimination by being prosecuted for, and convicted of treason. She also argues that, in effect, the Nationality Act of 1940 licenses treason by certain United States citizens caught in an enemy country during a war; that she was tried for "unlicensed" trea-

son, which is not a treasonable offense under the constitutional definition of treason.

Assuming, arguendo, that under the Nationality Act of 1940 a United States citizen residing abroad may become naturalized to the enemy in time of war and thereafter assist the enemy in its war effort against this country without violating the treason statute, it does not follow that those United States citizens residing in the enemy country who retain their citizenship have been denied due process of law by being subjected to prosecution for treasonous acts. It is well settled that a statute which is uniform in the obligation of all members of a legitimate class to which it is made applicable is not violative of the due process clause of the Fifth Amendment, *Pfeiffer Brewing Co. v. Bowles* (Em. App. 1945) 146 F. 2d 1006, cert. denied, 324 U. S. 865. The treason statute applies equally to all persons "owing allegiance to the United States" and applies to treasonous acts where ever committed. Appellant, having retained her citizenship, was one of the class of persons to whom the treason statute applied, and its enforcement as to her was in no way discriminatory.<sup>13</sup> She maintains that others situated the same as she escaped criminal responsibility by virtue of having exercised a privilege granted under the Nationality Act of 1940 and that she, therefore, was denied equal protection of the laws. The fact is, that she too could have expatriated herself under the Nationality Act of 1940 and thus removed herself from the category of persons to whom the treason statute applied. Those who exercised the privilege granted by the Nationality Act of

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<sup>13</sup> Appellant's apparent suggestion (Br. p. 45) that she has been subjected to discriminatory action because certain other American-born Japanese with whom she worked at Radio Tokyo, but who became naturalized Japanese citizens, were not prosecuted for treason is without merit. Even if the persons named by appellant were to be regarded as being subject to a treason prosecution, that fact could not help appellant since it is settled that an accused person cannot defend on the ground that others are presently or have been violating the law. *Grell v. United States*, 112 F. 2d 861, 875 (C. A. 8); *Saunders v. Lowry*, 58 F. 2d 158, 159 (C. A. 5).

1940 surrendered all rights as United States citizens, and they also lost its burdens. As to them, the treason statute was no longer applicable because they were no longer persons owing allegiance to this nation. Appellant, on the other hand, did not take this course but remained a citizen of the United States and as such was bound to obey its laws regarding treason or suffer the consequences. Appellant is actually claiming that she should be accorded all the rights of a United States citizen without the necessity of bearing one of the burdens. She asks too much!

The argument that Congress has licensed treason by its enactment of the Nationality Act of 1940 (Br. pp. 46-49) is absurd. Those who travel abroad and naturalize themselves to the enemy are not licensed; they are incapable of committing treason because they are no longer persons owing allegiance to the United States.

## II

### **Appellant Was Not Placed in Double Jeopardy, Denied a Speedy Trial, Due Process of Law, a Public Trial, or the Right to Compulsory Process.**

#### **A. Speedy Trial**

Appellant makes no showing and presses no claim that she or her attorneys ever made any demand for an early trial between the date of her arrest on August 26, 1948, and the day of the trial. After her arrest on that date she was brought to the United States, taken before a United States Commissioner and indicted with reasonable promptness (within 43 days). Thereafter she obtained an order permitting one of her attorneys to travel to Japan for the purpose of taking depositions at Government expense (1 R. 164, 165, 235, 236) and obtained a continuance of the trial date to permit the completion of that task (1 R. 193-195).

Accordingly, there was no denial of a right to a speedy trial insofar as any action of the trial court or the prosecutor is concerned, since there can be no denial of that



right unless a speedy trial is demanded, *Danziger v. United States*, 161 F. 2d 299, 301 (C. A. 9), cert. denied, 332 U. S. 769; *Pietch v. United States*, 110 F. 2d 817 (C. A. 10), cert. denied, 310 U. S. 648; *Worthington v. United States*, 1 F. 2d 154 (C. A. 7), cert. denied, 266 U. S. 626. Nor can there be a denial of such right where the defendant has requested or acquiesced in a postponement of the trial date, *Daniels v. United States*, 17 F. 2d 339, 344 (C. A. 9), cert. denied, 274 U. S. 744; *United States ex rel Hanson v. Ragen*, 166 F. 2d 608 (C. A. 7), cert. denied, 334 U. S. 849; *Phillips v. United States*, 201 Fed. 259 (C. A. 8).

Nor does appellant's internment in Japan by the occupying military force shortly after the surrender constitute a basis for reversal on this ground. At that time she was detained as a security safeguard and was not held or arrested on request of the Department of Justice.<sup>14</sup> Despite the statement to the contrary in her brief (p. 50), appellant was not at any time held in custody by the Department of Justice during this internment. The order effectuating her release dated October 23, 1946, was executed by the military authorities in Japan and not by the Department of Justice. Moreover, the order of May 7, 1946, indicates that while appellant was not considered subject to a military trial she was being held until the results of the military investigations were transmitted to the Department of Justice for its action. Although the telegram from the War Department to the United States Army, Pacific, stated that the "Department of Justice no longer desires Iva Toguri be retained in custody," no document or other evidence was introduced or offered to show that the Department of Justice had ever requested that she be held by the military authorities up to that time. Thus the statement contained in the telegram is a conclusion and hearsay, the truth of which is absolutely uncorroborated. (Ex. N.)

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<sup>14</sup> The authorization of this detention and the legal basis thereof are discussed herein, *infra*, pp. 45, 49-51.

Therefore the record shows that appellant was never charged with treason by the civil authorities nor by the occupying military forces until she was arrested on August 26, 1948, and her uncorroborated testimony that she demanded a speedy trial during her internment by the military authorities cannot avail her a reversal here. Regardless of whether appellant was or was not entitled to be released from internment, her demand for a speedy trial, if her testimony is to be believed, was premature and of no legal effect, *Shepherd v. United States*, 163 F. 2d 974, 977 (C. A. 8). The right to a speedy trial is one that arises after a formal complaint has been lodged against a defendant in a criminal case. It is elementary that one under suspicion of the commission of a crime has no right to demand that he be prosecuted therefor. That is a matter within the determination of the prosecutor and the grand jury.

### B. Double Jeopardy

Inasmuch as appellant was never tried by either a civil or military court for treason or any other offense, she was not subjected to double jeopardy. *United States v. Radov*, 44 F. 2d 155 (C.A. 3); *Wainer v. United States*, 82 F. 2d 305 (C.A. 7), affirmed, 299 U. S. 92. Confinement awaiting trial does not constitute former jeopardy, *Dixon v. United States*, 7 F. 2d 818 (C.A. 8); a *nolle prosequi* before trial is not a bar to another indictment for the same offense, *United States v. Rossi*, 39 F. 2d 432 (C.A. 9); and this court has held that the dismissal of an indictment on demurrer does not preclude a trial for the same offense under a valid indictment, *Henry v. United States*, 15 F. 2d 624, cert. denied, 274 U. S. 737. Moreover, the Supreme Court has held that judgment in a preliminary examination discharging an accused for want of probable cause is not conclusive and constitutes no bar to a subsequent trial in a court to which the indictment is returned, *Morse v. United States*, 267 U. S. 80, 85.

### C. Due Process

There is no substance to appellant's argument that she was denied due process of law because the Government pressed prosecution despite the alleged loss of some Zero Hour scripts and transcripts of interceptions by the Federal Communications Commission monitoring station at Hawaii. Her whole argument is predicated upon the assumption that the foregoing evidence would have been favorable to her defense and that the Government suppressed it. In this respect there is nothing to show whether the evidence would have been favorable or unfavorable to appellant, and her argument is based entirely on speculation and not on fact. After the occupation of Japan by the Allied military forces, appellant had autographed and given away scripts of the Zero Hour program which she had in her possession. The prosecutor was able to locate some of these scripts and they were identified and introduced in evidence, over appellant's objection, as Government exhibits 22, 23, and 44.

One witness, Cowan, produced a script (Ex. 44) which had been given to him by appellant (26 Tr. 2822). He testified that his superior, Lieutenant Kaduson, had other scripts (27 Tr. 2827-2828) and that appellant had autographed various scripts and given them to other members of the motion picture crew to which Cowan was attached (26 Tr. 2837). Cowan and Kaduson were not intelligence officers but were information specialists engaged in making a sound film of appellant for the purpose of providing information for and education of military personnel (26 Tr. 2828-2829). The prosecutor had searched for these scripts but was unsuccessful in locating them (26 Tr. 3000-3001; 27 Tr. 3074-3075). Appellant's counsel was furnished Kaduson's address and had been in communication with him but did not call him as a witness (48 Tr. 5346-5347). Thus the loss of the evidence, so far as appellant is concerned, is directly attributable to her. She had the scripts

but gave them away as autographed souvenirs. Since the prosecutor sought and found other scripts which appellant had given to a news reporter of the armed forces (Ex. 22; 13 Tr. 1351-1356) and had located and introduced in evidence the scripts which appellant turned over to counter-intelligence officers (14 Tr. 1417; Ex. 23), there is no basis for any assumption that the prosecutor considered the missing scripts as being favorable to the appellant. And it follows that he was not engaged in suppressing evidence. The missing scripts were not shown to have been a part of the Government files; in fact the testimony of Cowan indicates the contrary, i.e., that they were kept by the soldiers to whom they were given as personal mementos of their wartime experiences.

The witness Roth identified two transcripts (Exs. 63 and 75) which she had made from interceptions of two Zero Hour programs while she was employed as a monitor by the Federal Communications Commission. The witness was able to identify appellant's voice and recalled that she heard that voice broadcast on these particular programs. These transcripts were introduced in evidence over appellant's objection. (52 Tr. 5846, 5858, 5879.) This witness testified on cross-examination that summaries and complete transcripts of the Federal Communications Commission intercepts were made but that the summaries were not in existence, that she did not know where the files of the complete transcripts, if any, were located (52 Tr. 5866-5868, 5870-5871, 5872, 5886-5887), and appellant did not request the prosecutor to produce any additional Federal Communications Commission transcripts, nor did she request the name and address of the person having custody of the same. A reading of exhibits 63 and 75 will indicate the probable reason for appellant's reluctance.

The remaining transcripts were Government records. The prosecutor was not suppressing them. The very presence of Miss Roth on the witness stand is evidence of that



fact. Since the two transcripts introduced in evidence contained material which was obviously propaganda, there is no reason to assume that other transcripts would be different in their nature. Moreover, there is no assurance that the witness could definitely recall that the voice identified as that of appellant participated in other programs. In the case of exhibits 63 and 75 she had an independent recollection of the event and of hearing appellant's voice.

Moreover, the fact that evidence is no longer available is no defense to a criminal action. Witnesses die and physical evidence is lost or deteriorates. The prosecutor is not an insurer, nor is he bound to collect evidence for the defense. The preparation of the defense is the function of the defense lawyer—not the prosecutor. This is not a case of using evidence known to be perjured and it cannot be blown up into a great issue of suppressing evidence which might exculpate the appellant.

#### **D. Public Trial**

Appellant's objection that she was denied a public trial because earphones were not provided for the spectators in the courtroom (Br. pp. 226-227) was largely disposed of in *Gillars v. United States*, 182 F. 2d 962, 977 (App. D. C.). In addition to the facilities provided for the court, court clerk, court reporter, jury, and counsel, a number of sets of earphones were installed for the press, making a total of 40 sets of earphones installed in the courtroom (19 Tr. 2017, 2018; 17 Tr. 1766, 1797). At the time the records were introduced in evidence an expert radio engineer had testified that the recordings were not of such quality as to be readily intelligible over a loud speaker but that they could be reasonably understood if headphones were used (17 Tr. 1773-1774, 1795). Special equipment of a professional type was installed in order to play the recordings (17 Tr. 1765-1766).

Thus listening facilities were available for the use of the appellant, her counsel, the court, its attaches, the jury, and

the members of the press. No one was excluded from the courtroom. Furthermore, a written transcript of the recordings (Exs. 16-21) was placed in evidence as Government's exhibit 25 and was therefore available as a part of the public record of the trial (19 Tr. 2015; 17 Tr. 1811-1812, 1813, 1814, 1819).

This court has held in situations analagous to the one at bar that there is no denial of a public trial where spectators have been excluded from the courtroom, but litigants, witnesses, jurors, counsel for the defendant and prosecution, officers of the court, members of the bar and representatives of the press were allowed to remain, *Reagan v. United States*, 202 Fed. 488 (C.A. 9); *Callahan v. United States*, 240 Fed. 683 (C.A. 9). The withholding of an income tax return from general publicity by placing it in the secret files of the court did not constitute a denial of a public trial, *Gibson v. United States*, 31 F. 2d 19 (C.A. 9), cert. denied, 279 U. S. 866. And in *Steiner v. United States*, 134 F. 2d 931, 934 (C.A. 5), cert. denied, 319 U. S. 774, it was held that there was no denial of a public trial where numerous brief arguments were made at the bench out of the hearing of the jury and the public.

Moreover, the phonograph recordings were exhibits and it is recognized that exhibits are not passed around among spectators in the courtroom. Failure to do so has never been suggested as constituting a denial of a public trial.

### **E. Compulsory Process**

On March 1, 1949, appellant filed several motions, in the first of which she requested the court to issue subpoenas to certain witnesses, 43 in number, residing abroad requiring their attendance at the trial at the expense of the Government (1 R. 117-118, 130-164). Except for certain high ranking Army officers, only one person named in her list of witnesses was alleged to be a United States citizen

(1 R. 124-125, 133-164).<sup>15</sup> The seventh motion requested that, in the event of the denial of the previous motions, the court enter an order providing for the taking of depositions at Government expense of witnesses residing abroad (1 R. 122-123). The court denied the first motion (1 R. 166) but granted the seventh (1 R. 167) and ordered that the Government defray the expense of taking depositions abroad and allowed appellant's attorney travel and subsistence expenses for that purpose. Moreover, with the consent of the Government, in the form of a written stipulation, appellant was granted the right to take depositions not only from the persons named in her motions but from such other persons as she deemed necessary. (1 R. 168-169, 171-172.) At a later date a supplemental order was entered increasing the expense allowance of appellant's counsel to cover the additional time he spent in Japan (1 R. 227, 235).

Thus appellant requested not only compulsory process requiring the appearance in the United States of persons residing in a foreign country but she also asked that the Government bear the expense of transporting and maintaining these witnesses. She was entitled to neither as a matter of right.

The process of United States courts does not extend to persons residing in a foreign country unless such persons are United States citizens. *United States v. Best*, 76 F. Supp. 138, 139, aff'd, 184 F. 2d 131 (C.A. 1); *United States v. Hoffmann*, 24 F. Supp. 847, 848. Aliens who are inhabitants of a foreign country cannot be compelled to respond to a subpoena, since they owe no allegiance to the United States. *Cf. Blackmer v. United States*, 284 U. S. 421. This fact is recognized by the Congress, since 28 U.S.C. (Rev.), Section 1783, provides in part:

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<sup>15</sup> Appellant did not offer at the trial, the deposition of any person residing abroad who she had alleged to be a United States citizen in her motion of March 1, 1949. Compare list of depositions (1 R. VIII, XI) with the list of persons whom she requested the court to bring to the United States at Government expense (1 R. 124-125, 133-164).

a. A court of the United States may subpoena for appearance before it, *a citizen or resident of the United States who*: \* \* \* [Italics supplied.]

Furthermore the constitutional provisions guarantee only the right to the issuance and service of process and do not include the right to have the expenses paid by the Government, *Wallace v. Hunter*, 149 F. 2d 59, 61 (C. A. 10). And the question of whether the Government shall pay the fees and expenses of defense witnesses is one which is addressed to the sound judicial discretion of the trial court, *Meeks v. United States*, 179 F. 2d 319 (C. A. 9); *Dupuis v. United States*, 5 F. 2d 231 (C. A. 9); *Casebeer v. Hudspeth*, 121 F. 2d 914 (C. A. 10), cert. denied, 316 U. S. 683; *Brewer v. Hunter*, 163 F. 2d 341, 342 (C. A. 10). The Supreme Court has ruled that it will not review the exercise of such discretion, *Goldsby v. United States*, 160 U. S. 70; *Crompton v. United States*, 138 U. S. 361.

Appellant was not deprived of the testimony of the persons named in her motion and accompanying affidavit, since the court entered an order permitting the taking of depositions and providing that the expense incident thereto be borne by the Government.<sup>16</sup> The testimony of such persons was obtained and used by her attorney at the trial, although it developed that much of it was inadmissible for various reasons.

### III

#### The District Court Had Jurisdiction

Appellant maintains that the military authorities violated the so-called "Posse Comitatus Act," Act of June 18, 1878, 20 Stat. 152 [10 U. S. C. Sec. 15 (1945 Ed.)]<sup>17</sup> by trans-

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<sup>16</sup> It should be noted that despite her plea of poverty, appellant had access to sufficient funds to send an investigator to Japan to accompany her attorney, and to bring two witnesses from Australia (30 Tr. 3395; 37 Tr. 4215-4216, 4218-4219; 51 Tr. 4721).

<sup>17</sup> This act is set out verbatim in Appendix A. It is also quoted in the *Chandler* case at page 936.



porting her from Japan to San Francisco on an Army transport in custody of a military guard at the request of the Department of Justice. She contends that such return to the United States does not constitute "being brought" within the meaning of 18 U. S. C. Section 3238 [1948] (Br. p. 58).

Appellant's argument in this respect is first predicated upon the unwarranted assumption that 10 U. S. C. Section 15 was violated. This point was raised in *Chandler v. United States*, 171 F. 2d 921, 936 (C. A. 1), cert. denied, 336 U. S. 918, and again in *Gillars v. United States*, 182 F. 2d 962, 972-973 (App. D. C.). In both cases the Court of Appeals held that the "Posse Comitatus Act" has no application to occupied enemy territory where the military power is in control and Congress has not set up a civil regime.<sup>18</sup>

Furthermore, as the *Gillars* case points out: "The court was not required to refuse to try her when she was in fact here, even assuming for the present purposes that she was brought here unlawfully. *Chandler v. United States*, *supra*, and cases cited 171 F. 2d at page 934. See also *Pettibone v. Nichols*, 1906, 203 U. S. 192, 27 S. Ct. 111, 51 L. Ed. 148, 7 Ann. Cas. 1947; *In re Johnson*, 1896, 167 U. S. 120, 17 S. Ct. 735, 42 L. Ed. 103; *Cook v. Hart*, 1892, 146 U. S. 183, 13 S. Ct. 40, 36 L. Ed. 934; *Mahon v. Justice*, 1887, 127 U. S. 700, 8 S. Ct. 1204, 32 L. Ed. 283; *Ker v. Illinois*, 1886, 119 U. S. 436, 7 S. Ct. 225, 30 L. Ed. 421."

In a Federal criminal removal proceeding brought within this circuit, Judge Neterer said: "... the mere fact, and if true, as stated in the petition, that the defendant was kidnapped from British Columbia, would not give this court power to examine such fact, and, if true, release the de-

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<sup>18</sup> The correctness of that holding is apparent when it is recalled that the act (10 U. S. C. § 15) represented the termination of a long struggle to put an end to that aspect of reconstruction which employed Federal troops to police State elections in States in which the civil power had been reestablished. Its history has been ably recounted by Lieber in *The Use of the Army in Aid of the Civil Power*, War Department Document No. 64, Office of the Judge Advocate General, Government Printing Office, 1898; *Chandler v. United States*, *supra*.

fendant," *United States v. Unverzagt*, 299 Fed. 1015, 1018 (W. D. Wash.), aff'd sub nom. *Unverzagt v. Benn*, 5 F. 2d 492 (C. A. 9), cert. denied, 269 U. S. 566.

Accordingly, appellant's contention is without merit.

#### IV

### **The Evidence Was Sufficient to Establish Appellant's Guilt**

Appellant maintains that the judgment of conviction should be reversed and judgment of acquittal entered on the ground that her intent to betray the United States was not established beyond a reasonable doubt (Br. pp. 54-57). Her argument is that uncontradicted testimony that she gave assistance to certain allied prisoners of war was sufficient as a matter of law to create a reasonable doubt concerning her intent to betray.

In determining whether a case should be reversed on the ground of insufficiency of the evidence, the rule is that the evidence is to be considered in the light most favorable to the Government, *O'Leary v. United States*, 160 F. 2d 333 (C. A. 9); *Canella v. United States*, 157 F. 2d 470 (C. A. 9); *Borgia v. United States*, 78 F. 2d 550, 555 (C. A. 9), cert. denied, 296 U. S. 615.

In so considering the evidence, an appellate court will indulge all reasonable presumptions and will draw all inferences permissible from the record, *Henderson v. United States*, 143 F. 2d 681 (C. A. 9). Moreover, a reversal will be granted only if there is no substantial evidence to support the verdict, *Craig v. United States*, 81 F. 2d 816, 827 (C. A. 9), cert. denied, 298 U. S. 690; *Jelaza v. United States*, 179 F. 2d. 202 (C. A. 4).

*Curley v. United States*, 160 F. 2d 229 (App. D. C.), cert. denied, 331 U. S. 837, upon which appellant relies (Br. pp. 55-56), points out that the trial court must submit the issues to the jury if a reasonable mind might fairly have or not have a reasonable doubt as to the defendant's guilt. It is

only where the court concludes that there *must* be a reasonable doubt in a reasonable mind that it may direct a verdict. However, this court has not, as yet, adopted even this view. It has been held here that “the reasonable doubt which often prevents conviction must be the jury’s doubt, and not that of any court, either original or appellate,” *Craig v. United States*, 81 F. 2d 816, 827, cert. denied, 298 U. S. 690.

It will be observed that appellant’s “Detailed Statement of Facts” and argument make no reference whatsoever to the Government’s evidence relating to the issue of intent. We have sought to remedy that oversight in the summary of facts set forth herein, *supra* pages 3-39. When the Government’s evidence is considered in toto there can be but one answer to the question of whether appellant intended to adhere to the enemy. Of course she did! What other possible answer is there to the act of an American citizen who, in time of war, broadcasts propaganda for the enemy, from enemy country, for pay, for the purpose of weakening the will of American troops to fight and to create homesickness, nostalgia, and war-weariness among those soldiers? Such a person makes herself a part of the enemy’s propaganda machine. She does so for hire in order to feather her own nest and actively works toward the end in view.

Every court which has ever considered the propaganda broadcast situation has held that a citizen in the pay of the enemy who broadcasts propaganda for them is guilty of treason, *Joyce v. Director of Public Prosecutors* (1946) A. C. 347; *Chandler v. United States*, 171 F. 2d 921, 942-944 (C. A. 1), cert. denied, 336 U. S. 918; *Gillars v. United States*, 182 F. 2d 962, 971 (App. D. C.); *Best v. United States*, 184 F. 2d 131, 137 (C. A. 1).

Thus, when appellant worked as a paid broadcaster for Radio Tokyo on the Zero Hour, knowing it was acting as a propaganda arm of the Imperial Japanese Government and knowing the aims and purposes of the program, she gave

aid and comfort to the enemy. For it has never been doubted that, "when war exists, any act clearly indicating a want of loyalty to the government, and sympathy with its enemies, and which, by fair construction, *is directly in furtherance of their hostile designs*, gives them aid and comfort," *Charge to the Grand Jury*, 1 Bond 609, 611, Fed. Cas. No. 18272; 30 Fed. Cas. at 1037 (C. C. S. D. Ohio). [Italics supplied.]

Here appellant's broadcasts emanated from the enemy country and were directed as weapons at the armed forces of the country to which appellant owed allegiance. She was hired for the precise purpose of broadcasting sentimental music interspersed with comments designed to cause homesickness and war-weariness among the listening audience. Even apart from what appellant said or broadcast, her participation in the operations of the program, which was proved to be a part of the enemy's war machine, amounts to an adherence to that enemy. The Japanese considered that she gave them aid and comfort; why should any court categorically declare the contrary?

The record fully discloses the interest and control of the Imperial Japanese Government in the Zero Hour program. It discloses the aim and purpose of the program and the manner in which they were to be achieved. Appellant's knowledge of all this was abundantly proved, her participation in it as a paid employee was more than proved, it was admitted. The attitude with which she accepted this employment was adequately summed up in her own statements to others that she liked the work because the pay was good, the hours shorter, the work interesting, the contacts and surroundings enjoyable, and there might be a future in it.

The nature of the songs and comments broadcast by appellant was proved by those who were present when she broadcast and by those who heard the program over the short wave radio while fighting the Japanese in the South Pacific. The songs and comments attributed to her fit hand-in-glove into the propaganda theme arranged by the Japa-



nese Government. The music was sentimental; the comments sometimes taunting, sometimes fear-inspiring, but mostly nostalgic reminders of the good times back home. Nor did appellant omit the divide-and-conquer technique, since she frequently reminded her listeners of the good pay and infidelity of those back home.

Yet in spite of all this, appellant has the temerity to argue that because she gave assistance to certain allied prisoners of war (who collaborated with her in her work at Radio Tokyo) there was insufficient evidence of her intent. (She casts her contention in terms of reasonable doubt, but even on that basis her argument must fall.) The assistance appellant afforded the prisoners certainly cannot entirely neutralize all the other evidence in the case. It does not necessarily follow that her humanitarian acts were related to intent. She could have been motivated by other reasons: pity, friendship, gratitude, or affection. None of these would bear upon her intent to adhere to the enemy.

Tested by the legal principles set forth above, it is readily perceived that there was sufficient evidence to justify her conviction of treason. It is not the function of this court here to weigh the evidence or judge the credibility of the witnesses—those are jury functions—but only to ascertain whether the evidence suffices, *Craig v. United States, supra*.

## V

### Admissibility of Government's Evidence

#### A. Written Admissions of Appellant

Appellant contends that exhibits 2, 15, and 24 were not admissible in evidence under the rule announced by the Supreme Court in *McNabb v. United States*, 318 U. S. 332, and subsequent cases (Br. pp. 138, 145, 147). She also argues that the Government failed to lay a preliminary foundation of voluntariness as to these exhibits and that they were inadmissible for that reason (Br. pp. 140, 141,

147). As to exhibits 2 and 15, she maintains that the evidence shows that they were obtained by coercion and inducement and were therefore inadmissible (Br. pp. 143, 147).

#### 1. STATEMENT OF FACTS

On September 6, 1945, a message prepared jointly by the Department of State, the War Department, and the Navy Department and approved by the President was transmitted to General MacArthur through the Joint Chiefs of Staff.<sup>19</sup> As Supreme Commander for the Allied Powers, General MacArthur was directed to exercise his authority as he deemed proper to carry out his mission and to act directly and with such measures, including the use of force, as he deemed necessary. It was made clear that his authority was supreme. On September 10, 1945, the Commander in Chief, Army Forces of the Pacific (CINCAFPAC), through its Adjutant General, authorized the commanding generals of the forces under General MacArthur's command to apprehend and detain citizens and nationals of the United Nations who were suspected of treason and persons who might constitute a threat to the security of the military forces occupying Japan (Ex. P).

Appellant was apprehended and interned October 17, 1945, pursuant to the authority contained in the order of September 10, 1945 (Ex. N). On May 1, 1946, appellant's case record was transmitted to the Adjutant General, War Department, Washington, D. C., for reference to the Department of Justice or other interested Government agencies (Ex. N).

Exhibit 2 was a yen note autographed by the appellant with her signature and the words "Tokyo Rose" and given by her as a souvenir to a guard at Yokohama Prison in October 1945 (1 Tr. 35-36). Appellant was not molested by the guard (1 Tr. 47), who was unarmed (1 Tr. 48, 50, 51;

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<sup>19</sup> See 13 Department of State Bulletin 480, September 30, 1945, Vol. XIII, No. 327. A copy is printed in Appendix B.

2 Tr. 92), and she gave the exhibit voluntarily and without any preliminary refusal (1 Tr. 51). Appellant wrote the words "Tokyo Rose" on the yen note of her own accord and not at the request or suggestion of the guard (1 Tr. 54). The witness obtained the appellant's autograph by his own personal request and not as the result of any governmental order (2 Tr. 95-96).

Exhibit 15 consisted of notes taken by a famous war correspondent, Clark Lee, for International News Service, during an interview with appellant in a hotel room in Tokyo immediately after the Japanese surrender and before appellant was apprehended or detained by the occupying military force. Appellant's husband, Lesli Nakajima, a friend of appellant, and Harry Brundidge, another newspaper correspondent, were present (7 Tr. 478-479, 482-483). Lee related the substance of his conversations with appellant (7 Tr. 481-488). Lee wore a khaki shirt and trousers, a baseball cap, and a United States war correspondent's badge (7 Tr. 491-492). Although Lee was armed he did not wear his gun in the hotel room but took it off and laid it on a table or hung it in a closet (7 Tr. 516, 532-533). Appellant and her husband came to the hotel in the company of Nakajima (7 Tr. 515). Lee and Brundidge were trying to get an interview; it was not a confession or a legal document of any kind (7 Tr. 521). Lee and Brundidge had offered her \$2,000 for an exclusive contract in writing her story (7 Tr. 522), and appellant told them she was the only "Tokyo Rose" (7 Tr. 522-525, 557).

During the interview the door was "very likely" locked because the story was considered of importance in the profession and Lee and Brundidge did not want any other correspondent to walk into the room during the interview (7 Tr. 531). Lee testified that appellant's husband did not appear to be frightened and that he had no reason to be frightened and that as to appellant, "there was no atmosphere of tension or threat or anything of the sort at all" (7 Tr. 537). There were several interruptions, they had

“tea and cigarettes and things of that sort” (7 Tr. 538, 539). Appellant was not held in detention (8 Tr. 601). Lee was an experienced newspaper reporter who took notes in the interest of accuracy (8 Tr. 603) and told appellant he was a reporter and war correspondent (8 Tr. 604) and was not representing the United States Government (8 Tr. 605).

In March 1948 appellant was living with her husband in Tokyo, having been released from detention 18 months previously by the military authorities. She was requested by the military authorities, acting for Mr. John B. Hogan, an attorney in the Department of Justice, to talk with Mr. Hogan at Army headquarters, and an Army vehicle was sent to bring her downtown because of a stoppage in the transit system in Tokyo at that time (8 Tr. 610, 618, 621-622). Appellant met Hogan and Brundidge, who had accompanied him to Tokyo in an unofficial capacity (8 Tr. 630), in a reception room in the Dai Iti Building (8 Tr. 610). Appellant was interviewed there in the presence of a female receptionist (8 Tr. 610, 631-632; 47 Tr. 5217). Hogan identified himself and told appellant she was being investigated for treason and might be prosecuted (8 Tr. 610-611). He also advised her that anything she said or signed could be used against her (8 Tr. 613, 624-625).

Appellant read Lee's notes, acknowledged them to be an accurate account of what she said at the original interview, and signed her name to them (8 Tr. 611-612).<sup>20</sup> She was not threatened or coerced in any way (8 Tr. 613).

Exhibit 24 was a written statement signed by appellant and given to Federal Bureau of Investigation Agent Fred Tillman. Appellant was interviewed by Tillman in the visitors' room at Sugamo Prison on April 29 and 30, 1946. Tillman identified himself as a special agent of the Federal

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<sup>20</sup> Appellant states that Hogan asked her if she would “dare” to sign exhibit 15. This was based upon a typographical error in the transcript which has since been corrected with consent of appellant's counsel. The correct statement of Hogan's testimony is that he asked her if she “cared” to sign the exhibit (see order of this court dated October 12, 1950, correcting the record).



Bureau of Investigation, told her what he wanted to discuss, that she was not required to make a statement, that any statement she might make could be used against her, and that she had a right to counsel. The interview began in the morning and terminated at 4 p. m., with an intermission for lunch. There was no door on the room in which the interview took place and guards and others had access thereto to ascertain that the prisoner was still there. The substance of the interview was reduced to writing in the form of exhibit 24, and appellant read it, made corrections, initialed each page, and signed it in the presence of Tillman and a soldier. No threats or promises were made to appellant by Tillman, and he did not exert any duress or coercion upon her. She spoke freely and voluntarily. (14 Tr. 1448-1457, 1462; 15 Tr. 1497-1498, 1472-1483.) During the interviews appellant was not in the custody of Tillman but remained in the custody of Army guards who were responsible for her custody and safety (Ex. 0). The interviews were of short duration.<sup>21</sup>

## 2. THE SO-CALLED McNABB RULE

The evidentiary rule announced by the Supreme Court in *McNabb v. United States*, 318 U. S. 332, and subsequent cases has no application to the case at bar because the statute and rule of Federal criminal procedure upon which the evidentiary rule rests have no application to military action abroad and because appellant's internment by the Supreme Commander for the Allied Powers in Japan was in accordance with his authority and the laws of war.

It is well to remember that appellant did not at any time during the trial of this cause object to the introduction of any exhibit or any oral testimony on the ground that the evidence was obtained in violation of the rule laid down in the *McNabb* case. Thus, the trial court was not afforded

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<sup>21</sup> Exhibit O, introduced by appellant, shows that on April 29, 1946, appellant talked with Tillman from 10 a. m. until 11:50 a. m.; on April 30, 1946, she was interviewed from 9:30 a. m. until 11:40 a. m., and from 2:25 p. m. until 4:05 p. m.

an opportunity to pass upon the present contention, and the possibility of the application of the *McNabb* rule was not brought to his attention during the trial. At the time of the trial this rule of evidence had been in effect over six years. It is suggested that appellant's present contention comes too late.

Appellant's status is different from that of a person arrested by civil authorities in the United States for the commission of a criminal offense. Between October 17, 1945, and October 25, 1946, she was detained as a security safeguard by the occupying military force in Japan pursuant to their own regulations. She had not been apprehended upon the complaint or instigation of the civil authorities and she was not charged with treason or any offense.

Appellant was an occupant and resident of a country occupied by a superior military force by virtue of an unconditional surrender by the enemy government. The commander of that military force, General MacArthur, was and still is the Supreme Commander for the Allied Powers and therefore a representative of the Allied Powers and not of the United States alone, *Hirota v. MacArthur*, 338 U. S. 197. Such an occupying military force is, in all respects, supreme. It may exercise all the powers given by the laws of war, and its principal object in administering an occupied area is to provide for the security of the invading army.<sup>22</sup> By the message of September 6, 1945, General MacArthur, as Supreme Commander for the Allied Powers, was empowered to exercise his authority as he deemed proper to carry out his mission and to use such measures as he deemed necessary. The authority to establish internment compounds and to intern persons constituting a threat to the security of our forces was specifically delegated by General MacArthur to the generals under his command by the telegram of September 10, 1945 (Ex. P). Suspected traitors

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<sup>22</sup> See War Department Basic Field Manual, Vol. VII, Part 2, Rules of Land Warfare, §§ 282, 286.

were specifically mentioned. Thus General MacArthur and his subordinates were acting under the law of the military, the law of war, and his use of that law and power had been ratified by this Government. We, therefore, do not look to the civil laws of either the conquering or the conquered country for the authority to govern the conquered territory, but to the law of war, whose supremacy is essential for the protection of the officers and soldiers of the Army, *Dow v. Johnson*, 100 U. S. 158, 170; *Dooley v. United States*, 132 U. S. 222, 230; *Madsen v. Kinsella*, 93 F. Supp. 319, 323 (S. D. W. Va.).

Two recent treason prosecutions have affirmed this power. In *Gillars v. United States*, 182 F. 2d 962 (App. D. C.), the court said (p. 972):

The right of one belligerent to occupy and govern the territory of the enemy while in its military possession is one of the incidents of war and flows directly from the right to conquer. We, therefore, do not look to the Constitution, or political institutions of the conqueror, for authority to establish a government for the territory of the enemy in his possession, during its military occupation, nor for the rules by which the powers of such government are regulated and limited. *Dooley v. United States*, 1900, 182 U. S. 222, 230. 21 S. Ct. 762, 765, 45 L. Ed. 1074, quoting Halleck on International Law, Vol. II, page 444. See, also, *MacLeod v. United States*, 1912, 229 U. S. 416, 425, 33 S. Ct. 955, 57 L. Ed. 1260.

And in *Best v. United States*, 184 F. 2d 131 (C. A. 1), the court held that the search of Best's apartment in Vienna and the seizure of certain documents therein were not unreasonable in view of the military situation at the time.

The defense exhibits N, O, and P conclusively prove that appellant was detained by the occupying military force pursuant to its own regulations which were designed to protect

the security of that force and to ferret out and punish those guilty of war crimes.

The apprehension and internment of appellant was a reasonable exercise of the military power. She was a person trained to write and broadcast propaganda designed to create nostalgia and homesickness among the troops of the occupying nation. She was a suspected traitor, a person who had gone over to the other side and worked for them. To allow her to remain at large might be dangerous to the occupying forces, since she possessed a capability of spreading discontent among the occupying forces and also of fomenting disorder and unrest among the population of a country whose military forces preferred death to surrender. In those early days of the military occupation of Japan the temper and qualities of resistance of the conquered people could not be anticipated or gauged, and the internment of those capable of agitating the masses was certainly the safest course to pursue. In its setting, therefore, the internment of appellant was not unreasonable.

In addition to the law of war, the war power conferred by the Constitution carries with it its inherent power to guard against the renewal of the conflict, *Stewart v. Kahn*, 78 U. S. 493, 507; *In re Yamashita*, 327 U. S. 1, 12, and to punish offenders of the laws of war, *Ex parte Quirin*, 317 U. S. 1.

While Congress has recognized the necessity for the use of military commissions in order to preserve their traditional jurisdiction, it has not prescribed any rules or enacted any laws governing their procedure, nor has it enacted any laws pertaining to the government of occupied territory.

The so-called *McNabb* rule does not rest upon any constitutional ground; it is a rule of evidence now based on Rule 5(a), Federal Rules of Criminal Procedure, and was adopted to implement and render effective the basic policy which the Court found to underlie that rule and a Federal



procedural statute, now repealed,<sup>23</sup> *McNabb v. United States*, 318 U. S. 332. The *McNabb* case and *Upshaw v. United States*, 335 U. S. 410, as well as others decided in accordance with the doctrine there laid down, leave no doubt but that the exclusionary features of this rule of evidence are predicated upon the willful violation of the procedural requirements of 18 U. S. C. § 595 (1946) or its successor, Rule 5(a), Federal Rules of Criminal Procedure. As presently interpreted by the Supreme Court, by this circuit, and by other Federal courts of appeal, the rule of the *McNabb* case is not one of absolute exclusion voiding any confession obtained from a person not immediately taken before a committing magistrate, *United States v. Mitchell*, 332 U. S. 65; *Symons v. United States*, 178 F. 2d 615 (C. A. 9), cert. denied, 339 U. S. 985; *Chevillard v. United States*, 155 F. 2d 929, 935-939 (C. A. 9); *Garner v. United States*, 174 F. 2d 499 (App. D. C.), cert. denied, 337 U. S. 945.

The former procedural statute and Rule 5(a), Federal Rules of Criminal Procedure, do not apply to the conduct of the military force occupying Japan; they apply only to arrests made by civil officers in the United States for civil offenses.

Nor can the policy underlying the *McNabb* rule be applied to the situation here presented. Appellant seems to suggest that the policy could be predicated upon an Article of War (Br. p. 139),<sup>24</sup> but those Articles apply only to the classes of persons specified in Article 2.<sup>25</sup> In general, the persons enumerated in that Article are members of our own Army and of personnel accompanying the Army. Appellant is

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<sup>23</sup> 18 U. S. C. § 595 (1946 Ed.), upon which the *McNabb* rule originally rested, was repealed when Title 18 U. S. C. was revised September 1, 1948, because that section had been superseded by Rule 5(a) F. R. Crim. P., which became effective March 31, 1946.

<sup>24</sup> It is noted in passing that this court has held in *Kronberg v. Hale*, 180 F. 2d 128, cert. denied, 339 U. S. 969, that the 70th Article of War relating to the furnishing of charges is not mandatory but discretionary.

<sup>25</sup> 10. U. S. C. § 1473.

not such a person.<sup>26</sup> The Supreme Court has held that the procedural rules contained in the Articles of War are not applicable in the trial by a military commission of an enemy commander for war crimes, *In re Yamashita, supra*. In that case the Court said (p. 20) :

By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the articles, Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not, apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.

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<sup>26</sup> *Madsen v. Kinsella*, 93 F. Supp. 319, 325-327 (S. D. W. Va.).

If the actions of military tribunals in Japan are not reviewable by courts of the United States, *Hirota v. MacArthur*, 338 U. S. 197; *Toneo Shirakura v. Royall*, 89 F. Supp. 713, then the internment of appellant by the allied military force in Japan pursuant to the power conferred by the laws of war is not subject to the procedural rules of 18 U. S. C. § 595 or the succeeding rule of criminal procedure.

#### EXHIBIT 2

It is obvious that the *McNabb* rule is not applicable to exhibit 2 not only for the reasons set forth above but also because this exhibit was only an autograph given by appellant to one of her guards as a souvenir. It was not introduced as an admission on her part but only as a proved specimen of her handwriting to be used for purposes of comparison. The situation is thus entirely different from *McNabb*, which deals with confessions of guilt obtained by police or investigators during a detention in violation of a rule or statute requiring speedy arraignment.

#### EXHIBIT 15

The contention that appellant's signature on exhibit 15 was obtained in violation of the *McNabb* rule is founded upon the theory that appellant was under arrest when she went to see Hogan on March 26, 1948. This theory is without any factual basis. At that time appellant was not under arrest and she was not being detained; nor was she under arrest or detention at the time of her original interview with Lee and Brundidge. She had voluntarily appeared for this interview as the result of a request and was not arrested or detained against her will, and the circumstance that she came by Army vehicle is of no consequence, since it appears that such method of transportation was a courtesy extended to her for her convenience due to a tie-up of the transportation system in Tokyo at that particular time. At this time appellant was living at home with her husband; she came from there and returned there after her interview with Hogan.

## EXHIBIT 24

While there is no doubt that appellant executed exhibit 24 during an interview with Special Agent Tillman while she was interned by the occupying military force in Japan, the policy announced in the *McNabb* and *Upshaw* cases does not apply. Appellant was not arrested and charged with a crime. She was an internee. She was not held in violation of any statute, rule, or Article of War requiring arraignment or the entering of a formal charge. The internment was in accordance with the power of the occupying military force to preserve the safety of its troops and to prevent disturbances. Thus there is a complete absence of the factual foundation which is required to bring into operation the rule in the *McNabb* case. In short, there is nothing upon which to base the rule.

Appellant's situation is analogous to that of an accused who has been legally committed to jail in default of bail or for a nonbailable offense. A voluntary confession obtained from one legally committed to jail is admissible in a criminal trial, *United States v. Gottfried*, 165 F. 2d 360 (C. A. 2), cert. denied, 333 U. S. 860; *McNabb v. United States*, 142 F. 2d 904 (C. A. 6), cert. denied, 323 U. S. 771.<sup>27</sup>

### 3. APPELLANT EXECUTED EXHIBITS 2, 15, AND 24 VOLUNTARILY.

Exhibits 15 and 24 contained certain admissions by appellant which related to the issues on trial, but appellant did not acknowledge guilt of the crime of treason.<sup>28</sup> On the contrary,

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<sup>27</sup> At the second trial of McNabb, the Government introduced satisfactory proof that the defendants had been brought before a committing magistrate promptly after their arrest and before questioning. It appeared, therefore, that at the time they made their confessions the McNabbs were being held in default of bail after arraignment before the magistrate. The confessions were again admitted, the defendants again convicted, and the convictions affirmed.

<sup>28</sup> Exhibit 2 contains only appellant's signature and the words "Tokyo Rose." It was, therefore, not strictly an admission but rather a proved specimen of appellant's handwriting and signature admissible under 28 U. S. C. § 1731 (1948 Ed.) for comparison with other signatures on exhibits which were to be offered later. It was in fact offered for that limited purpose (1 Tr. 36).



she sought to avoid guilt of any crime and to exculpate herself. The statements were, therefore, admissions and not confessions, and the rules governing their reception in evidence are much less onerous than those concerning confessions, *Dimmick v. United States*, 116 Fed. 825, 831 (C. A. 9), cert. denied, 189 U. S. 509; *Ercoli v. United States*, 131 F. 2d 354, 356 (App. D. C.); *Gulotta v. United States*, 113 F. 2d 683 (C. A. 8).

**(a) Preliminary Proof**

In her brief appellant makes no showing that she ever objected to the admission of these exhibits in evidence upon the specific ground that the Government had failed to prove their voluntary character; nor does she point to any specific attempt to obtain a ruling by the trial judge at any time as to the voluntary character of these exhibits. Thus appellant has failed to comply with Rule 20(2)(d) of the rules of this court. However, although it is doubtful whether, under the decisions of this and other Federal courts of appeal, the Government was required to offer preliminary proof of the voluntary character of appellant's admissions in the situations here presented, *Gray v. United States*, 9 F. 2d 337 (C. A. 9); *Ah Fook Chang v. United States*, 91 F. 2d 805, 809 (C. A. 9); *Hartzell v. United States*, 72 F. 2d 569 (C. A. 8), cert. denied, 293 U. S. 621; *Murphy v. United States*, 285 Fed. 801 (C. A. 7), cert. denied, 261 U. S. 617; *United States v. Johnson*, 76 F. Supp. 542, 548, aff'd in part, 165 F. 2d 42, cert. denied, 332 U. S. 852 (opinion by Judge Fee sitting in Middle District, Pennsylvania); *Wigmore*, 3rd Ed., § 860, the Government in fact made such proof as to exhibits 15 and 24. Exhibit 2 was shown by appellant's cross-examination to have been given voluntarily to the witness through whom it was introduced. Hogan's entire testimony, taken as a whole, indicates the voluntary character of the interview and the execution of exhibit 15. Prior to the introduction of this exhibit he specifically testified that she had appeared upon request; that he had told her

she was being investigated, might be prosecuted for treason, and that anything she said or signed could be used against her; that she was not threatened or coerced; and that she read the notes, acknowledged their accuracy, and signed them.

Tillman likewise testified prior to the admission of exhibit 24 in evidence, that he had identified himself to appellant and told her what he wanted to discuss, that she need not talk to him, that she had a right to counsel, and that any statement she made could be used against her. He testified that no threats or promises were made to her, that he did not exert any duress or coercion upon her, and that she spoke freely and voluntarily. Appellant makes no reference to any testimony tending in any way to refute or controvert this testimony.

As to exhibit 2, the defense brought out on cross-examination the fact that appellant had executed the exhibit voluntarily and without any preliminary refusal, that she was not molested, and that she wrote the words "Tokyo Rose" of her own accord and not at the guard's request or suggestion. This was sufficient to render the exhibit competent, since this court has held that a statement made by a defendant may be shown to be free and voluntary subsequent to the admission of the statement in evidence, *Johnstone v. United States*, 1 F. 2d 928 (C.A. 9).

**(b) The Facts Show That the Exhibits Were Executed Voluntarily.**

Appellant does not assert that exhibit 24 was involuntarily obtained by means of inducements or coercion.

The Government had nothing to do with the original interview between appellant and Clark Lee and Brundidge. They were newspaper correspondents, not soldiers, and appellant had entered into a contract with them whereby she would profit by giving them the exclusive rights to the story of her experiences. She had not been arrested or detained by the military authorities at that time. This is not altered by the fact that Lee and Brundidge wore the

uniforms of war correspondents and kept firearms in their room. Although the door of the room in which the interview was held was locked, Lee testified that it was locked in order to keep other correspondents out. Lee testified that appellant came to the interview of her own volition, that her husband and a friend were present, and that there was no atmosphere of tension or threat and no reason for appellant's husband to be frightened. A confession given under more terrifying circumstances than this was held valid by this court in *La Moore v. United States*, 180 F. 2d 49 (C.A. 9), a case in which the confessor was in leg irons and in solitary confinement.

Appellant argues that her own testimony is sufficient to invalidate exhibit 15 on the ground that it was obtained by improper inducements. The testimony upon which she relies (Br. p. 143) is that Brundidge told her at the second interview, in March 1948, that she would be doing herself a good deed by signing Lee's notes and that it would aid her in getting back to the United States. Even if appellant's statement be accepted as uncontroverted,<sup>29</sup> it does not follow that the failure to strike exhibit 15 was error. Clark Lee had previously testified about what the appellant had said at the original interview and had used the notes to refresh his recollection of that event. What appellant said was not a confession but only an admission, and her subsequent interview was a further admission that the notes were an accurate account of what she had originally told Lee and Brundidge. The exhibit 15 and the testimony of Hogan relative to it were, therefore, entirely corroborative of Lee's original testimony. As we pointed out above, at the time of this second interview, appellant was not under arrest or imprisonment. She appeared voluntarily, and a

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<sup>29</sup> Appellant testified that Brundidge made the statement in the presence of Hogan (47 Tr. 5220). However, Hogan testified that Brundidge did not make such a statement in his presence, but that he did not know what Brundidge had said out of his presence or whether in fact anything was said (8 Tr. 634).

receptionist was present. No threats or coercion were used on appellant, and she was told the reason for the interview.

Even if Brundidge made the statement attributed to him by appellant, it does not constitute such an inducement as would invalidate evidence of her statements concerning the exhibit. It was not a promise of leniency or of no prosecution and held out no hope in that direction. It was not a promise that she could return to the United States if she signed the Lee notes. Moreover, Brundidge was a newspaper reporter and known to the appellant as such. He was not a Government official and could not himself either facilitate or prevent appellant's return to the United States, and appellant must have been aware of this. What he said was unsolicited advice and only that.

Since appellant had been advised by Hogan that she was being investigated for treason, a capital offense, and that it was likely she would be prosecuted, the advice of Brundidge was not such as to be probable to cause her to admit the accuracy of the Lee notes and affix her signature thereto if they did not represent her true story. Nor is it probable that she would have embarked upon such a course involuntarily. What we are concerned with is whether her second admission, the one to Hogan, was truthful, and the remark of Brundidge is not of such a character as to produce a probable incentive on the part of appellant to lie about the Lee notes. The notes contained many exculpatory statements and statements that if believed would work for appellant's benefit. When all the circumstances are considered, the probability of her telling Hogan the truth is high.

If authorities are needed there are many which hold that even in the case of true confessions much more potent considerations did not impugn the verity of the confession. Thus, a statement that in imposing sentence the courts generally take into consideration the fact that a defendant has pleaded guilty has been held not to be such an inducement as to invalidate a confession, *United States v. Lonardo*, 67



F. 2d 883 (C.A. 2). And a confession made after being advised that relatives and friends were about to be subjected to questioning has been held valid, *Hawkins v. United States*, 158 F. 2d 652 (App. D.C.), cert. denied, 331 U.S. 830; *Vogt v. United States*, 156 F. 2d 308 (C.A. 5); *Ruhl v. United States*, 148 F. 2d 173 (C.A. 10). The offer of personal influence to secure leniency when made to an attorney by a member of the board of governors of a State bar association was not sufficient inducement to invalidate an admission, *Steiner v. United States*, 134 F. 2d 931, 935 (C.A. 5), cert. denied, 319 U.S. 774. An admonishment to a suspect that another had given evidence against him and that it would be better for him to speak the truth was not sufficient inducement to subject the mind to "the flattery of hope or the torture of fear." In *Martin v. United States*, 166 F. 2d 76 (C.A. 4), and in *Young v. United States*, 107 F. 2d 490 (C.A. 5), it was held that the deceit practiced by disguising an officer as a fellow prisoner was not sufficient to warrant the exclusion from evidence of statements made by the prisoner to the disguised officer.

The facts here are quite different from those in *Bram v. United States*, 168 U. S. 532, upon which appellant relies. In that case the defendant was taken into custody, searched, examined, and stripped of his clothing. He was accused of murder, told that the police were satisfied of his guilt, confronted with an accusation of a supposed eyewitness, and exhorted not to take the blame alone but to name his accomplice. That is a far cry from the facts here developed. Here appellant was not in custody, was not searched or subjected to any indignity. She was interviewed in the presence of her husband and of other disinterested parties, and there was no atmosphere of hostility surrounding the interviews.

Exhibit 2 was not an admission but only a specimen of appellant's handwriting given to a guard as a souvenir at his request. He testified at length as to the circumstances surrounding her autographing the yen note. There was

nothing to indicate any duress or threats against the appellant.

### **B. The Oral Admissions**

Appellant contends that her interviews with Kramer and Keeney and with Page and Fenimore were induced by "one sort of pressure or another" and that the statements made by her were inadmissible on the theory that they were not free and voluntary (Br. p. 148).

Although appellant characterizes the testimony with respect to what she said at these interviews as "Oral Confessions," her statements were not confessions. She did not admit guilt and made some exculpatory and self-serving statements.

#### **1. THE KRAMER-KEENEY TESTIMONY**

Dale Kramer and James J. Keeney were a sergeant and corporal who were correspondents for "Yank" magazine (13 Tr. 1344; 14 Tr. 1400) who talked to appellant on several occasions between September 1 and 6, 1945 (13 Tr. 1345). Kramer was first taken to see appellant by her husband (13 Tr. 1375; 14 Tr. 1404). A few days later appellant and her husband went voluntarily by street car to see Kramer at the house in which he was staying (13 Tr. 1346-1347). Kramer and Keeney told appellant that they represented Yank magazine, that they were soldiers, that Yank magazine was an Army publication for enlisted men (13 Tr. 1348; 14 Tr. 1400). She was urged to give an interview but told that it was not necessary for her to do so and that to remain silent was quite legal (13 Tr. 1375). Appellant talked freely and voluntarily (13 Tr. 1347-1349; 14 Tr. 1401), and there was no coercion, duress, or threat directed toward her (14 Tr. 1401-1402). Kramer and Keeney arranged for appellant to be interviewed by 100 war correspondents at the Grand Hotel in Yokohama (14 Tr. 1410-1411) and in so doing told her it would be better to present herself to all the correspondents and have one

interview than to remain in seclusion and be badgered by them (14 Tr. 1414).

The facts therefore are not such as to sustain appellant's argument. She was not under arrest, in custody or detention. She was not being interviewed by arresting officers or by military police. She was told the reason for the interview, and no threats or physical acts of compulsion were visited upon her. Moreover, she was attended by her husband and on at least one occasion by a Japanese friend (14 Tr. 1403). The statement about being "badgered" by correspondents was not, as appellant implies (Br. p. 150), made to induce her to talk to Kramer and Keeney but was advice given to guide her in her future relations with the press. There is no atmosphere here of a coerced or induced statement. The episode relates solely to the efforts of representatives of the press to obtain a story concerning appellant. As such, it is but the story of an everyday occurrence.

## 2. THE PAGE-FENIMORE TESTIMONY

Appellant argues that her interview with Page and Fenimore, who were members of the Army Counter Intelligence Corps, was involuntary because of the "pressure" previously applied by Kramer and Keeney. She makes no argument based on what transpired at her interview with Page and Fenimore. Since there was in fact no pressure or atmosphere of compulsion surrounding her interviews with the war correspondents, there was none to carry over to the Page-Fenimore interview.

### C. The Testimony Which the Government Elicited From the Witnesses Moriyama, Mitsushio, Ishii, Lee, and Igarashi Was Admissible.

Appellant contends (Br. p. 224) that the court was in error in admitting certain testimony by Government witnesses elicited on direct or redirect examination by the prosecutor. This contention relates only to minor incidents in a three-month trial and is without substance.

In the course of his testimony Moriyama testified as to two statements which he heard appellant broadcast over the Zero Hour. One related to "dancing with your girl at the Cocoanut Grove" (24 Tr. 2552) and the other made reference to the heat and being at the corner drug store having an ice cream cone (24 Tr. 2553). Moriyama was able to fix the place as the broadcasting studio of Radio Tokyo, the hour as 6:15 p.m., and named other persons present (24 Tr. 2550-2553). He was unable to fix the exact date. Thus, the place of the occurrence and the time of day was fixed sufficiently to enable appellant to contradict the occurrence. Those named as being present, Oki, Reyes, and appellant, were available and in fact all appeared as witnesses in the case. The testimony was admissible. See *Graul v. United States*, 47 App. D. C. 543.

The prosecutor's questioning of Mitsushio concerning the date when Major Ince stopped broadcasting on the Zero Hour is perhaps repetitive but does not constitute cross-examination (13 Tr. 1325-1326). In any event the fact proved was not in dispute, since Ince appeared as a witness for the defense and testified to the same fact, giving the same date (31 Tr. 3476).

Ishii was testifying relative to news broadcasts which he made on the Zero Hour at Radio Tokyo between the spring of 1944 and November 1944. He stated that appellant was present when he made the broadcasts except on Sunday, and the time was fixed as shortly after 6 p.m. (17 Tr. 1829-1832). Ishii testified that his news broadcast dealt with war news from Japanese military sources and emphasized Allied war losses. This was a statement of fact as to what his broadcasts were about. It was not a conclusion or opinion but a statement of the contents of the broadcasts made by the person who had actually performed the work.

Appellant objects to Clark Lee's testimony that he did not hold her in detention on the ground that it "speaks for itself." No reason is assigned in the brief. Certainly



Lee could testify as to the fact of whether he was or was not holding appellant in detention.

Appellant complains (Br. p. 199) that the prosecution was allowed to lead the Government witness Igarashi and was guilty of misconduct. The witness was a Japanese national who had expressed some doubt as to his ability to testify in English because it was not his native tongue (24 Tr. 2602, 2603). This was his first experience before an American court and he stated that he was a bit confused and was suffering from stage fright (25 Tr. 2669). Contrary to appellant's contentions, the witness was not coached (24 Tr. 2641).

Under the foregoing circumstances, it would have been proper for the court to have exercised its discretion to allow the witness to be led. However, no leading questions were permitted, although the prosecutor was permitted to ask questions designed to exhaust the witness' memory of the occurrence about which he was testifying. In any event, it has been held in matters of this sort that the propriety of the questions is so largely a matter of discretion and depends so much upon the circumstances of each case, that it is unwise for an appellate tribunal to review the act of the trial court, *Wagman v. United States*, 269 Fed. 568 (C. A. 6), cert. denied, 255 U. S. 572; *Linn v. United States*, 251 Fed. 476 (C. A. 2).

None of the foregoing is error. That appellant must fasten upon such trivialities in order to attempt to bolster her case merely emphasizes the judicial ability of the trial court in its rulings upon the admissibility of the testimony of Government witnesses.

#### **D. Exhibits 25 and 75 Were Properly Admitted.**

##### **1. EXHIBIT 25**

Appellant here objects for the first time (Br. p. 226) that the trial court erred in not limiting exhibit 25 (transcript of recordings) to the actual content of the recordings (Ex. 16-21). This contention is made despite the fact that the

appellant never voiced the objection below<sup>30</sup> and was herself at least partly instrumental in causing the insertion of the material to which she now objects.

Exhibit 25 was a transcript of exhibits 16-21 made by an expert monitor who testified that it accurately reflected the contents of the recordings (17 Tr. 1809-1810). It was used by the jury as an aid in evaluating the contents of the recordings, and as such was admissible, *Coplin v. United States*, 88 F. 2d 652, 671 (C. A. 9), cert. denied, 301 U. S. 703; *Harris v. United States*, 48 F. 2d 771, 777 (C. A. 9). At the time exhibit 25 was originally offered, several pages now contained in the transcript<sup>31</sup> were not included because they dealt with a recording which Government counsel inadvertently broke in open court (17 Tr. 1814). Appellant objected on the ground, among others, that it was not full and complete (17 Tr. 1815, 1816, 1817, 1818), and the Court, upon ascertaining that the transcript was incomplete, required the prosecutor to produce the additional pages and admitted the entire transcript in evidence as exhibit 25 (17 Tr. 1819, 1820). Appellant then renewed her former objections by reference thereto and did not object to the added pages for the reason which she now advances (17 Tr. 1820; 18 Tr. 1847).

Thus, appellant did not at any time interpose an objection to the admission of the transcript on the ground that it covered recordings not in evidence, but on the contrary had previously objected to its admission on the ground that it was incomplete.

## 2. EXHIBIT 75

Part of appellant's defense was that the Zero Hour was an entertainment program. Appellant and two of her defense witnesses so testified (32 Tr. 3601; 34 Tr. 3875; 39

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<sup>30</sup> Appellant does not in her brief point out wherein she raised the objection which she now urges.

<sup>31</sup> From line 17, page 18, through page 23 (the page numbers are in red pencil). (See 20 Tr. 2021.)

Tr. 4403; 45 Tr. 4985, 4988) and she so argued to the jury (1 Arg. 121-125).

On rebuttal the Government offered Exhibit 75 to refute appellant's evidence on this point (52 Tr. 5859-5860). Exhibit 75 was a transcript of an interception of a Zero Hour program monitored by the Federal Communications Commission. The exhibit was made by the witness through whom it was introduced and who had monitored the program, recorded it, and typed the exhibit. She possessed an independent recollection of this particular program and was able to identify appellant's voice as the voice of one of the persons participating in the broadcast (52 Tr. 5855-5856, 5857-5858, 5861).

The exhibit contained statements made by the broadcaster which were propaganda and were vicious attacks upon the character of a high government official, now deceased. It, therefore, was admissible to disprove appellant's testimony as to the innocuous character of the Zero Hour program.

#### **E. Identification of Appellant as "Tokyo Rose"**

Appellant contends (Br. p. 180) that the prosecution considered it very important to pin the label "Tokyo Rose" on her. The record discloses, as will later be pointed out more specifically, that appellant's own acts and those of her counsel were responsible for the showing in the record that appellant was "Tokyo Rose." Exhibit 2, which was an autographed yen note with appellant's signature and the appellation "Tokyo Rose" written thereon in her own handwriting, was offered for the sole purpose of preliminarily proving appellant's signature (1 Tr. 36).

Shortly thereafter, Exhibits 4, 5, 6, and 7 (applications for passport, voter's registration affidavit, application for evacuation etc.), with appellant's signature thereon, were marked for identification and admitted in evidence. These latter exhibits pertained to appellant's citizenship and related matters. Exhibit 2 (autographed yen note) was admissible for the purpose of enabling the court and jury to

determine the genuineness of appellant's purported signature on exhibits 4, 5, 6, and 7. Title 28 U. S. C., Rev. Sec. 1731. Under the predecessor statute this court has held that it is proper, in order to prove a signature, to admit in evidence for comparison documents which witnesses testify they have seen signed by the one whose signature is questioned, *Bowers v. United States*, 244 Fed. 641, 648 (C. A. 9); *Fuston v. United States*, 22 F. 2d 66, 67 (C. A. 9); *Greenbaum v. United States*, 80 F. 2d 113, 124 (C. A. 9).

Appellant contends the admission of the recordings (Ex. 16-21) was error because the labels thereon bore the notation "Tokyo Rose." These were recordings of appellant's voice (9 Tr. 688-697; 48 Tr. 5382). These recordings and the labels thereon were official Government records and writings, were made in the regular course of governmental business (16 Tr. 1624, 1631, 1633, 1636, 1637, 1643, 1644, 1646, 1647, 1648, 1649), and were properly identified in accordance with the Business Records Act (Title 28 U. S. C. Rev. Sec. 1732) and the companion statute pertaining to Government books and records (Title 28 U. S. C., Rev. Sec. 1733(a)).

The Portland, Oregon, office of the Federal Communications Commission had been instructed by the Commission at Washington to monitor the Zero Hour program for a while (17 Tr. 1791, 1792; 16 Tr. 1667). The recordings and the labels thereon were also properly admitted as being of a public character and kept for public purposes. They were kept in the discharge of a public duty, *Evanston v. Gunn*, 99 U. S. 660, 666; *McInerney v. United States*, 143 Fed. 729, 736, 737 (C. A. 1); *Runkle v. United States*, 42 F. 2d 804, 806 (C. A. 10). The labels on the recordings can be considered as an exception to the hearsay rule. They were made under the sanction of official duty, as a record of facts to be kept in the files of the Government, *United States v. Cole*, 45 F. 2d 339, 341 (C. A. 6).

In any event the labels complained of on the recordings in question were not prejudicial to appellant. She testi-



fied that she had no particular antipathy toward using the name "Tokyo Rose" (48 Tr. 5352). She gave Clark Lee a souvenir of their meeting, autographed by her personally as "Tokyo Rose" (Ex. 14; 7 Tr. 481). She distributed her personal autograph as "Tokyo Rose" to thirty or forty different people (48 Tr. 5341). Early in the trial appellant's counsel brought out from Government witness Lee that appellant had stated that "she was the only Tokyo Rose" (7 Tr. 522). On cross-examination of Government witness Radio Engineer Green, appellant elicited information to the effect that "Orphan Ann" was "Tokyo Rose" (17 Tr. 1792). Her counsel also brought out testimony from Government Radio Engineer Penniwell to the effect that he had received instructions from Washington "to record the Orphan Ann portion of the Zero Hour as being Tokyo Rose" (16 Tr. 1667, 1668). Appellant herself brought out by cross-examining witness Oki that in 1944 there was some discussion about a dispatch from Stockholm which mentioned "Tokyo Rose who described herself as Orphan Ann" (9 Tr. 799, 800). The Government had not questioned Oki relative to the existence or contents of the aforesaid dispatch on direct examination. Thus, at the time the recordings were introduced, much of the testimony which tended to identify appellant as "Tokyo Rose" at the trial was already before the jury due to her own fault. Any error, if any in fact exists, was therefore harmless.

## VI

### Duress

#### A. The Law

All authorities agree that in order for a person to be relieved of the consequences of the commission of a crime on the ground of coercion the compulsion must be present, immediate, and impending and of such a nature as to induce a well founded fear of death or serious bodily injury. There must be no reasonable opportunity to escape the

compulsion without committing the crime, *R. I. Recreation Center v. Aetna Casualty and Surety Co.*, 177 F. 2d 603 (C. A. 1); *Shannon v. United States*, 76 F. 2d 490 (C. A. 10); *Gillars v. United States*, 182 F. 2d 962 (App. D. C.); *United States v. Vigol*, 2 U. S. (2 Dall.) 346; *Respublica v. McCarty*, 2 U. S. (2 Dall.) 86.

Force must be the basis of the fear engendered, and compulsion based upon other grounds is no defense. Thus, in *Ford v. United States*, 10 F. 2d 339 (C. A. 9), aff'd, 273 U. S. 593, it was held that one involved in a conspiracy to smuggle liquor could not escape criminal liability for wrongdoing because he acted under a contract obligating him to obey orders. *Guigni v. United States*, 127 F. 2d 786 (C. A. 1), similarly held that a captain and crew of a foreign vessel could not be given criminal immunity for the offense of sabotaging their vessel on the ground that they obeyed orders given by their government. In *State v. Patterson*, 117 Ore. 153, 241 Pac. 977, the defendant was not entitled to an instruction as to the defense of coercion where he showed that he committed the crime at the behest of another who threatened to expose previous criminal misconduct of the defendant unless he complied with the demand. See also the charge of Judge Washington in *United States v. Haskell*, 4 Wash. C. C. 402, Fed. Cas. No. 15,321.

The fear aroused must be of immediate violence; a threat of future death or bodily injury will not suffice, *People v. Sanders*, 82 Cal. App. 778, 256 Pac. 251; *People v. Martin*, 13 Cal. App. 96, 108 Pac. 1034; *R. I. Recreation Center v. Aetna Casualty and Surety*, *supra*. This principle was aptly pointed out in *United States v. Vigol*, *supra*, a case in which the defendant had been indicted for high treason, and the court charged:

. . . the fear, which the law recognizes as an excuse for the perpetration of an offense, must proceed from an immediate and actual danger, threatening the

very life of the party. The apprehension of any loss of property, by waste or fire; or even of an apprehension of a slight or remote injury to the person, furnish no excuse. . . .

Thus, at the time the crime is committed, the defendant must be subjected to the danger of death or serious injury if he refuses. The necessity or compulsion must be clear and conclusive; the alternative presented must be instant and immediate, *Ross v. State*, 169 Ind. 388, 82 N. E. 781. Both *Fosters Crown Cases* (1776), pp. 216-217, and *East's Pleas of the Crown* (1806), pp. 70-71, upon which appellant relies (Br. p. 105), make it clear that a person who seeks to excuse treasonable conduct on the ground of compulsion must show an original and actual force upon himself.

Moreover, in the case of a continuing offense such as treason, the same authorities carefully point out that one forcibly conscripted by the enemies of the state must show that the compulsion continued during all the time he remained with the rebels or enemies and that he quitted the service as soon as he was able. In *Respublica v. McCarty*, *supra*, a case involving treason, a similar thought was expressed by the Chief Justice in his charge wherein he said:

By the defendant's own confession, it appears, that he actually enlisted in a corps belonging to the enemy; but it also appears, that he had previously been taken prisoner by them, and confined at Wilmington. He remained, however, with the British troops for ten or eleven months, during which he might easily have accomplished his escape; and it must be remembered, that, in the eye of the law, nothing will excuse the act of joining an enemy, but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property. But had the defendant enlisted merely from the fear of famishing, and with the sincere intention to make his escape,

the fear could not surely always continue, nor could his intention remain unexecuted for so long a period.

Appellant's apparent argument that, where a person cannot obtain protection from his own government, coercion is a broader defense is not, therefore, consistent with the foregoing authorities. Such a theory, as expounded and applied by appellant in her brief, suggests a most dangerous rule of law, since all traitors under the protection of an enemy could later shield themselves from prosecution by setting up extraneous reasons for a mental fear of possible future actions on the part of the enemy. Such a defense would remove entirely the requirement that the defendant resist all advances, temptations, commands, and orders until such time as he would be faced with the harsh alternative of immediate injury or death unless he capitulated to the will of the enemy. Certainly no person should be excused for the commission of any crime, whether it be treason or some lesser offense, unless he has made every effort to escape and avoid its commission. It is only the stark necessity of committing the act in order to save his own life that will condone the offense. Any other less stringent rule of law would only tend to encourage the doing of an act which should not be done until all means of avoiding its commission have failed.

### **B. The Instructions**

Tested by the foregoing legal principles, it becomes clear that the court's instruction to the jury concerning what constituted a defense of coercion was correct (54 Tr. 5977-5979). The charge here given was almost entirely identical to that approved by the Court of Appeals for the District of Columbia in *Gillars v. United States, supra*.<sup>32</sup> The fact that the court made no mention of the cumulative effect of the appellant's evidence, while pointing out that cer-

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<sup>32</sup> See 182 F. 2d 962, n. 14, p. 976.



tain specific items thereof were not sufficient, was not error. As we have demonstrated above, a fear aroused by such events as police surveillance, the necessity of reporting to police, the belief that she would be placed in a concentration camp or deprived of a ration card will not excuse the commission of the crime. The element of immediacy is lacking, as is the element of a present and actual threat of force. Likewise, the instruction that appellant was not excused because she was ordered to do so by some superior authority, was correct, *Guigni v. United States, supra*, since an order unaccompanied by a threat of immediate force did not constitute the requisite compulsion.

The instructions which appellant requested (1 R. 311-315), and the omission of which she now complains, were improper for the very reason which she now assigns as the basis of her complaint (Br. p. 103). As she points out, each makes no reference to the element of immediacy. As we pointed out above, that element is necessary in a defense of this type. Without it the defense must fall.

Appellant maintains (Br. pp. 73-74) that the jury was not informed about her status in Japan although she requested instructions on that matter (1 R. 288). The court did charge the jury that she owed a local temporary qualified allegiance to Japan and that she had the duty to obey its laws (54 Tr. 5960-5961). It is difficult to perceive how the failure to state that she was an alien enemy of Japan would prejudice her in any way relative to the defense of duress. She did not contend that she was subject to any law or regulation of the Japanese Government which required her to broadcast or suffer severe bodily injury.

### C. Evidentiary Rulings

Appellant does not seriously contend that she was ever at any time threatened with immediate death or serious bodily harm if she refused to work as a broadcaster at Radio Tokyo. She testified that she did not broadcast or

continue to broadcast because of any physical compulsion or force or any threats thereof (47 Tr. 5289-5290; 49 Tr. 5502, 5504).<sup>33</sup> Appellant admitted that no pressure was exerted upon her by the Japanese or any one else to force her to take the broadcasting position at Radio Tokyo and that she was not threatened if she did not take it (48 Tr. 5332). She was never jailed, assaulted, whipped, beaten or ill-treated by the police (47 Tr. 5291). These facts were corroborated by the Japanese witnesses who had been employed at Radio Tokyo, many of whom testified that they were unaware of any duress, coercion, or compulsion having been exercised or directed against appellant (24 Tr. 2510, 2547, 2548; 25 Tr. 2684-2685, 2752-2753).

Therefore, her own testimony concerning how she became a broadcaster contains no statement of the application of such force or threat of force as to lead her to believe that she was in immediate or imminent danger of death or serious injury. Her whole theory of duress is predicated solely upon her own testimony of her conversation with Takano, the civilian head of the Radio Tokyo business office, who told her she had to take army orders and that she knew what the consequences were (Br. pp. 76-77, 79, 119). This testimony was adduced at the very end of her case, and appellant does not point to any evidence whatsoever relating to any threat upon her in connection with her work.

Despite the utter lack of any foundation, at the time the testimony was elicited the court allowed appellant's witnesses to testify about atrocities which they had witnessed or indignities which they had suffered if the witness had told the appellant about those events at any time. Thus Cousens, Ince, and Reyes testified about many cruelties inflicted by the Japanese upon captive soldiers and civilians. These were of such a nature as to inflame the jury against the Japanese. (28 Tr. 3116-3121, 3146; 31 Tr.

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<sup>33</sup> See Appellant's Brief, p. 79.

3567-3571; 32 Tr. 3665-3666, 3667, 3668, 3669-3670, 3671, 3672-3674, 3675.)

Appellant has pointed to many instances of such testimony in her brief, pages 79-81, and also has directed attention to the fact that she was permitted to cross-examine Government witnesses about how they had been treated by the Japanese, although they had not apprised appellant of these facts (Br. p. 82).

Appellant argues that the court was in error in refusing to admit (a) evidence of duress on others not communicated to her, (b) evidence that the entire broadcasting staff of Radio Tokyo was in a state of fear, (c) certain evidence of duress on others and communicated to appellant, and (d) evidence that appellant's neighbors made demonstrations against her. She seeks to justify the admissibility of this evidence on the theory that it tends to prove what she thought would be the consequences of a refusal to broadcast and that any fear which she might have had was "well grounded." If appellant had produced competent evidence that she had been threatened with some immediate and drastic action on the part of the Japanese military authorities in the event of a refusal to broadcast, her position might be better taken; but such is not the case. She admits there were no such threats. She is, in effect, trying to avoid the necessity of such a threat or of a positive action by any Japanese in authority by showing that she was afraid, because of other circumstances, to refuse. It is at exactly this point that her whole defense breaks down. She cannot excuse herself on the ground of what she thought might happen to her. She was never at the last ditch, but capitulated much too readily to avail herself of the legal defense.

The law is clear and the reason convincing. There must be actual imminent danger, not a danger conjured up in the mind as to what might happen. She is required to be steadfast in her determination to resist the commission of

a wrong until such time as she can no longer refuse without immediate reprisal.

What we are concerned with is whether appellant was threatened with an actual danger to her life or person at the time she agreed to broadcast and did broadcast. In *Gillars v. United States*, 182 F. 2d 962, 974-976 (App. D. C.) it was held that threats to others who were also employed on the German radio were properly excluded. Such evidence was closer to the mark than any offered here.

There are also other reasons of a more technical nature why it was not error to exclude much of the testimony about which appellant complains. Appellant bases her argument on her own testimony of her conversation with Takano, which was adduced at the end of her case.<sup>34</sup> She does not point to any other evidence relating to any threat against her in order to induce her to broadcast. Therefore, the trial court was acting within its discretion in excluding evidence of an inflammatory nature as to acts of which the appellant had no knowledge. The order of proof is largely a matter over which the court may exercise discretion, *United States v. Montgomery*, 126 F. 2d 151 (C. A. 3), cert. denied, 316 U. S. 681; *Thiede v. Utah*, 159 U. S. 510, 519.

Moreover, much of the evidence which she offered did not tend to show the likelihood that she would have been promptly mistreated or killed if she had refused to broadcast. The anger of her neighbors was not directed to her radio activities but toward her Christmas spirit (Br. p. 91). The evidence of conditions of the prisoners of war at Camp Bunka, established after appellant had been broadcasting several months, and about which she had no knowledge, related to the treatment by the Japanese of persons in a category different from that of appellant and dealt with a collateral matter. They were prisoners; she was a civilian employee of the radio station. Moreover, the former pris-

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<sup>34</sup> Appellant was almost the last witness for the defense. She was followed by attorney John Hogan, who was making his third appearance on the stand, and her attorney, Theodore Tamba (50 Tr.).



oners of war Henshaw, Cox, and Kalbfleish did not know the appellant (37 Tr. 4163-4164, 4185, 4186, 4261, 4277-4278). Parkyns saw her only three times at Radio Tokyo and did not testify as to any conversations with her (37 Tr. 4206). The Dutch prisoner Schenk had seen appellant only a "couple of times" at Radio Tokyo and could not testify as to any conversations with her (2 R. 521-522). Nevertheless out of an abundance of caution, the court permitted these witnesses to relate instances of mistreatment by the Japanese and that they were forced to work at Radio Tokyo (37 Tr. 4157-4158, 4165-4166, 4199, 4252, 4278-4279).

Appellant's complaint that the witness Couzens was not permitted to relate certain conversations with her pertaining to the treatment of prisoners of war at Camp Bunka (Br. p. 89) is invalid. The quotation in her brief at page 89 is that of an argument which her attorney made to the court and not of a question which he addressed to the witness (29 Tr. 3254-3255). The question to which objection was sustained at 29 Tr. 3287 was clearly leading and objected to as such. Moreover, the question was asked in another form immediately thereafter and the witness permitted to answer (29 Tr. 3287).

The limitation of the cross-examination of the Government witnesses Tsunishi and Oki of which appellant complains at pages 92-93 of her brief was proper. Appellant's cross-examination of these witnesses went far beyond the scope of the direct examination and amounted to putting in an affirmative defense during the presentation of the Government's case. This was patently improper and it was within the court's discretion to exclude the evidence which appellant sought to bring out at that time, *Putnam v. United States*, 162 U. S. 687, 707; *The Philadelphia and Trenton Railroad Co. v. Stimpson*, 39 U. S. (14 Pet.) 448, 461; *United States v. Minuse*, 142 F. 2d 388 (C. A. 2), cert. denied, 323 U. S. 716; *McBride v. United States*, 101 Fed. 821, 824 (C. A. 8); *Chevillard v. United States*, 155 F. 2d 929, 934 (C. A. 9).

On the whole the appellant was afforded a much wider latitude in her proof of conditions in Japan and the treatment of prisoners of war and civilians than is strictly permissible under the issue of duress. Certainly enough evidence was before the jury to afford them an insight into the appellant's situation in Japan at the time she worked at Radio Tokyo and to enable them to evaluate her actions in the light of those conditions.

#### **D. The Geneva Convention**

In this case the offense of treason consists of adhering to the enemies of the United States, giving them aid and comfort, plus the commission of an overt act. Thus, it is an offense primarily of the mind, heart, and spirit, coupled with the doing of an act which will assist the enemy.

The Geneva Convention is primarily a contract between nations relating to the manner in which they will conduct themselves in relation to each other. It in no way modifies or supersedes the criminal laws of this country. Even if it be construed as permitting the enemy to use prisoners of war for work indirectly connected with their war effort, it does not follow that Congress ever intended to permit United States citizens, whether prisoners of war or un-interned civilians in enemy hands, to escape liability for treason because the overt act might be considered an indirect aid to the enemy. If the adherence to the enemy, the treasonable intent, is present no citizen is excused. The treaty in no way condones an adherence, and it does not alter or modify the existing law. Without adherence, without treasonable intent, appellant could perform acts conceivably more helpful to the enemy than those she committed here. See *Cramer v. United States*, 325 U. S. 1, 29; *Haupt v. United States*, 330 U. S. 631, 634-635. It was not the direct or indirect character of her act which constituted the offense. It was the commission of the act with treasonable intent.

Therefore, regardless of whether appellant was a prisoner of war within the meaning and intent of the treaty—and the Government does not admit she was—the instructions which she requested (1 R. 298-308) were properly refused, since they would have created a false issue and confused the jury as to the true issue involved, namely, whether appellant adhered to the enemy and committed any of the overt acts charged with treasonable intent.

## VII

### **Cross-Examination of Defense Witnesses**

#### **A. Cross-Examination of Appellant**

Appellant contends that it was improper for the court to permit the prosecutor to cross-examine her with respect to the variance between certain portions of her testimony and the testimony of previous Government witnesses (Br. pp. 153-163); that on several occasions the prosecutor misstated the testimony of other witnesses in examining her (Br. pp. 176-179); that it was error to permit her to be cross-examined concerning overt act 8 (Br. pp. 164-168); and that there were numerous other erroneous rulings relating to her cross-examination (Br. pp. 168-175).

Appellant was present throughout the entire trial and her direct testimony, which came at almost the very end of her defense, consumed the better part of four days (44 Tr.; 47 Tr.). The direct testimony covered the period of her entire life ranging from her birth in 1916 down until her arraignment before the United States Commissioner in the fall of 1948 for the offense for which she was on trial. She gave a detailed account of her activities in Japan, particularly as they related to her employment at Radio Tokyo. During the course of her direct testimony, she stated that between November 1943 and August 1945 she had never adhered to the Japanese Government or the Broadcasting Corporation of Japan and had never given aid and comfort to the enemy of the United States or intended so to do.

She testified that during the same period of time she never did anything with intent to lower or undermine American military morale, or with intent to create nostalgia or war weariness among the American troops. Appellant also testified that during the above period she never did anything with intent to discourage the American armed forces, and that she did nothing with intent to impair the capacity of the United States to wage war (47 Tr. 5233-5235). On cross-examination her testimony can only be characterized as evasive (48 Tr. 5378-5382; 49 Tr. 5390-5393, 5443-5446).

Appellant, by the very scope of her direct examination, subjected herself to a full and searching cross-examination on behalf of the United States, *Powers v. United States*, 223 U. S. 303, 315; *Shipley v. United States*, 281 Fed. 134 (C. A. 5), cert. denied, 260 U. S. 726. The latitude to be allowed the Government in its cross-examination of the appellant is a matter within the sound discretion of the trial court, whose rulings in that regard will be reviewed only in the event of an abuse of discretion, *Austin v. United States*, 4 F. 2d 774, 775 (C. A. 9); *Land v. United States*, 177 F. 2d 346, 350 (C. A. 4).

When appellant came to the witness stand she was clothed with the legal presumption of credibility, a presumption which was, however, rebuttable, and it was quite appropriate for the Government to cross-examine her in such a manner as to test her credibility, *United States v. Waldon*, 114 F. 2d 982, 984 (C. A. 7), cert. denied, 312 U. S. 681. In questioning appellant her predilection for half-truths, her evasiveness, and her direct contradiction of some of her own witnesses, as well as those of the Government, created a situation in which it was appropriate to test her memory and her credibility by reference to the testimony of other witnesses. Such an examination afforded an opportunity for the jury to determine whether the appellant was steadfast in her conviction that her memory with respect to events was accurate and correct. The means and the readiness with which she accepted this challenge af-



forded a sure test of her reliability. If she was positive of her position and certain with respect to the veracity of her answers, this line of questioning provided a challenge which, if she had but accepted it squarely, conceivably could have produced an acquittal. On cross-examination, appellant was first asked whether she had listened to a Government witness testify on a certain point (49 Tr. 5460-5468). In many instances she testified that she was unable to recall the testimony of the Government witness on the particular point which was the subject matter of the interrogation, and the examination was ended there (49 Tr. 5397, 5466-5467). In only a few instances was she pressed to answer as to the verity of the previous testimony, and on several occasions she was able to explain the difference between the testimony (49 Tr. 5455-5456, 5474). The cross-examination was properly allowable as a means of attacking appellant's credibility, *Reagan v. United States*, 157 U. S. 301, 305.

Similar cross-examination, obviously more prejudicial than that here involved, arose in *United States v. Buckner*, 108 F. 2d 921, 929 (C. A. 2), cert. denied, 309 U. S. 669, in which the court of appeals held that Government examination inquiring how far the defendant would persist in his statements, in the light of other expected testimony, did not require a mistrial on the ground that it constituted an attempt by the prosecution to inject into the questions propounded evidence not otherwise admitted. In that case the court of appeals states:

The line between proper cross-examination, inquiring of a witness how far he will persist in his statements in the light of other expected testimony, and questions which seem to set forth such testimony as facts, becomes narrow and a considerable discretion in determining it should be left to the trial judge.

Appellant's complaint that on cross-examination she was confronted with questions containing misstatements of the

facts by the prosecutor is utterly unfounded (Br. pp. 176-179). On cross-examination, she was asked whether or not she had told a friend (Chiyeko Ito) that Kuroishi had told appellant to apply for a position at the Radio, and that several other girls had applied for the same position. Miss Ito, the appellant's friend, had testified on her behalf and on cross-examination had stated that appellant told her that Kuroishi had told the appellant to apply for the job at Radio Tokyo (40 Tr. 4533). She had given a signed statement to special agents of the Federal Bureau of Investigation which contained the same statement (Ex. 68). On cross-examination, Miss Ito testified that the signed statement was substantially true (40 Tr. 4537-4538). Thus, appellant's contention that the testimony about her job application was misquoted to her by the prosecutor is totally without any foundation in the record.

Appellant also complains that the prosecutor asked her whether she had heard the witness Cousens say that he was against the Allied policy of unconditional surrender (49 Tr. 5458). This question was not answered and therefore did not inure to appellant's detriment. Furthermore, the question contained no erroneous assumption, since Cousens admitted on cross-examination that he was against the Allied demand for an unconditional surrender by the Japanese (30 Tr. 3432-3433). Cousens also admitted being the author of exhibit 48, a radio script which characterizes the Allied demand for unconditional surrender as, "Some people in America still talk this madness of unconditional surrender." And so, again, we find appellant's claim that the Government misquoted testimony in its cross-examination of her to be completely unfounded.

Appellant maintains (Br. p. 178) that the prosecution "browbeat her for six pages" trying to make her say that she never applied for reestablishment of her citizenship. This is a violent statement, to say the least, and exceeds the propriety of the situation under consideration. Appellant was most evasive in her testimony on this point (50

Tr. 5540-5545). She never did file an application for re-establishment of American citizenship, and the record so discloses. The only application which appellant filed with the Department of State was an application for a passport with supporting documents (50 Tr. 5543-5545).

Appellant's claim that her cross-examination as to overt act 8 set forth in the indictment was beyond the scope of her direct examination is predicated upon a narrow conception of the allowable scope of the cross-examination of a defendant (Br. pp. 164-168). Even a cursory examination of the record discloses beyond peradventure of a doubt that the cross-examination with respect to overt act 8 not only was proper but was well within the limits of her direct examination.

Appellant's alleged criminal intent during the entire period of her employment at Radio Tokyo was a crucial issue. As she pointed out, she had specifically denied any treasonable intent. However, what is designed in the minds of an accused is never susceptible of proof by direct testimony. This is particularly true in a treason prosecution, *Cramer v. United States*, 325 U. S. 1, 31. On the issue of intent, the prosecution was entitled to have the jury consider all the evidence related to appellant's treasonable broadcasting activities at Radio Tokyo for the purpose of enabling them to determine whether she harbored the requisite criminal intent, *Chandler v. United States*, 171 F. 2d 921, 944 (C. A. 1), cert. denied, 336 U. S. 918. This includes what she did and also what she said, *Haupt v. United States*, 330 U. S. 631, 642.

The indictment charged that overt act 8 was committed between May 1, 1945, and July 31, 1945 (1 R. 6). On direct examination, appellant spoke of her work at Radio Tokyo in May 1945 (45 Tr. 5070-5071) and of her absence therefrom during the same period of time. She also testified as to what personnel acted as announcers during that period of time (45 Tr. 5074). She related in detail her knowledge of the operations at Radio Tokyo and her famili-

arity with the Zero Hour program (46 Tr. 5137, 5138). When the appellant took the stand and testified about criminal intent, about her activities at Radio Tokyo, and about all the details concerning her life in Japan, she opened wide the door for cross-examination with respect to overt act 8, since all her activities at the Radio had a bearing on the question of her alleged traitorous intent.

In a similar instance, this court stated in *Austin v. United States*, 4 F. 2d 774 (C. A. 9) (p. 775):

The testimony of the plaintiff in error, while brief, was to the effect that he was a mere agent or solicitor, and not the principal, in the transaction complained of; but this testimony, brief as it was, opened up the entire case, because his activities had a material bearing on the issue.

Cross-examination, which is in effect further examination by the opponent, has for its utility the extraction of all the circumstances known to the witness but previously undisclosed by him in his direct testimony, *Branch v. United States*, 171 F. 2d 337, 338 (App. D. C.). Thus, an accused who testifies in his own behalf in a criminal case can be compelled to supply the full details of matters within the scope of the direct examination but about which he has testified only in part. This principle was carefully elucidated by this court in *Diggs v. United States*, 220 Fed. 545, 563 (C. A. 9), aff'd, sub nom. *Caminetti v. United States*, 242 U. S. 470. At page 563 this court said:

I am firmly persuaded that the defendant having taken the stand and offered his testimony upon the merits of his case, and having entered into it in part, rendered himself amenable to cross-examination as to the whole, and further when he sought to show that the girls went upon the journey of their own free will and accord, without persuasion and inducement upon his part, then that his acts and demeanor at the time of



leaving, including the purchase of tickets, and while upon the trip and at Reno, became subjects of perfectly legitimate inquiry, to test the accuracy of his own rendition of how they all came to go upon the same journey. A defendant cannot tell a half story touching his defense, which is a half story from his standpoint of the merits of the case, then abruptly stop in his course and decline to answer further, and expect to reap the benefit for himself to be derived therefrom, without incurring the discredit that is, by the rules of evidence and legal inference, visited upon the ordinary witness pursuing a like course.

This principle has been adopted by the Fourth Circuit in *Bowling v. United States*, 18 F. 2d 863 (C. A. 4), wherein the court stated that in its opinion the weight of authority holds that an accused who voluntarily takes the stand as a witness for his own purpose can be properly cross-examined on all material matters connected with the particular case, and that his offer of testimony upon any fact is a waiver as to all other relevant facts because of the necessary connection between them.

The suggestion that the Government's cross-examination forced appellant to incriminate herself is utterly devoid of merit. When she took the witness stand in her own behalf she waived her constitutional privilege of silence, and the Government had the right to cross-examine her upon the evidence in chief with at least the same latitude as would be exercised in the case of an ordinary witness, *Sawyer v. United States*, 202 U. S. 150; *Rea v. Missouri ex rel Hayes*, 84 U. S. 532; *Fitzpatrick v. United States*, 178 U. S. 304, 315.

Appellant's remaining contentions are equally unmeritorious. She contends that she was asked repetitive and argumentative questions, and questions calling for conclusions, when she was cross-examined. These contentions are without merit and appear almost too trivial to merit a

reply. It is sufficient to say that the extent to which the Government may go in a criminal case in the cross-examination of a defendant for purposes of impeachment is largely a matter of discretion with the trial judge, *Silverman v. United States*, 59 F. 2d 636, 639 (C. A. 1), cert. denied, 287 U. S. 640; *Gowling v. United States*, 64 F. 2d 796, 798 (C. A. 6). For example, appellant claims it was improper for the prosecution to ask her if she had ever regained Japanese nationality. This was a proper line of questioning to pursue inasmuch as her allegiance to the United States was in issue. Furthermore, in exhibit 5 in a sworn statement, appellant stated that her name was entered in her father's family register on September 13, 1916, but her father in 1932 took steps to have her renounce her Japanese nationality, and her name was crossed out of his register on January 13, 1932. She stated further in exhibit 5 that she never regained Japanese nationality since January 13, 1932.

Likewise, appellant complains because the prosecution asked her on cross-examination if she were an American citizen (Br. p. 173). The indictment alleges she was a citizen of the United States, and one who owed allegiance to the United States at the time of the commission of the acts pleaded in the indictment (1 R. 2). Her citizenship and allegiance were issues below, and the trial court so instructed the jury (54 Tr. 5956). She had made contradictory statements under oath as to her citizenship. In exhibit 5, sworn to in 1947, she stated she was an American citizen, but in 1949 she swore in an affidavit in support of a special plea herein, that she was a citizen and national of Portugal (Ex. 72).

Appellant contends that it was prejudicial error to allow the prosecution to cross-examine her as to her knowledge of the purpose of the Japanese radio programs. She testified on direct examination that she had been told that the Zero Hour program was an entertainment program only (45 Tr. 4999). Her knowledge as to the propagan-

distic purposes and use of the Zero Hour program was one of the issues in the case. Also the cross-questioning complained of was proper as going to appellant's intent and to her knowledge of the propagandistic purpose of the Zero Hour program on which she was employed as an announcer and broadcaster, *Cramer v. United States*, 325 U. S. 1, 31. On the issue of intent the prosecution was entitled to have the jury consider all evidence having a rational bearing on what was in appellant's mind—which necessarily is a matter of inference, *Chandler v. United States*, 171 F. 2d 921, 944 (C. A. 1), cert. denied, 336 U. S. 918. In *Best v. United States*, 184 F. 2d 131, 137 (C. A. 1), the Court of Appeals for the First Circuit made the following statement which is pertinent to the point under discussion:

Best certainly knew he was dealing with enemy agents. He knew the hostile mission of the German short wave station, which was to facilitate a German military triumph by disintegrating the fighting morale of the American armed forces and the civilian population.

Appellant contends that she was questioned on cross-examination as to a confidential and privileged communication passing between herself and her husband. The question complained of inquired if appellant had told her husband that she was a Portuguese national (48 Tr. 5321). Appellant was unable to recall any such conversation, so that the cross-questioning complained of was not in any event prejudicial to her (48 Tr. 5321). But the privilege that existed concerning conversations between appellant and her husband was waived when she put her husband on the witness stand as her witness and interrogated him as to conversations with appellant regarding her nationality. Appellant's husband testified on direct examination that appellant had told him on many occasions that she was an American citizen and that she had been reared and educated in America (43 Tr. 4785). Appellant's husband testified without objection on cross-examination that appellant had

told him she was a Portuguese national (44 Tr. 4879). Under this state of the record, appellant waived any privilege that obtained, by herself revealing the conversation and its contents in open court. This court has had occasion to rule on a similar situation. In *Wolfe v. United States*, 64 F. 2d 566 (C. A. 9), this court held that a letter from a man to his wife was not privileged where the contents of the letter were revealed to the stenographer to whom the letter was dictated. The Supreme Court affirmed in *Wolfe v. United States*, 291 U. S. 7.

Appellant's contention that the prosecution's conduct in cross-examining her was so grossly improper and unfair as to fall within the disapproval expressed in *Berger v. United States*, 295 U. S. 78, 84, is without merit. In that case the Court said of the Assistant United States Attorney (p. 84) :

He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they have not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending that a witness had said something which he had not said and persistently cross-examining the witness on that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general of conducting himself in a thoroughly indecorous and improper manner.

Appellant here makes out no such case. There was no persistent continued course of misconduct such as would constitute a general conducting of the prosecution in a thoroughly indecorous or improper manner, no bullying and arguing with witnesses, no pretense that a witness said something that he had not said, no suggestion that statements had been made to him personally out of court, as to which no evidence was offered, no assumption of facts not



in evidence, and no putting of words in the mouth of the witness under examination.

The record shows that while cross-examination of appellant was firm, as it must be, there was no bullying, but merely an effort made to elicit responsive answers to the questions propounded. Firmness and persistence on the part of the prosecutor were required in order to cope with the evasive and elusive answers of the appellant. There is no pronounced and persistent misconduct with a probable cumulative effect such as was found to exist in the *Berger* case. Moreover, this was not a weak case but a strong one. Had the *Berger* case been as strong as this one, it is doubtful whether even there the Supreme Court would have reversed on the ground of misconduct. (See *Berger v. United States*, 295 U. S. 78, 89.) Abstract inerrancy is hardly possible in the trial of a case in a Federal court; it is never an essential to a valid trial there, *Maryland Casualty Co. v. Reid*, 76 F. 2d 30, 33 (C. A. 5); *Langford v. United States*, 178 F. 2d 48, 55 (C. A. 9), cert. denied, 339 U. S. 951. Appellant's guilt having been abundantly proved, her attempt to turn the case into a trial of Government counsel, though a not infrequent expedient of defendants who have no other recourse, ought not to succeed, *United States v. Dubrin*, 93 F. 2d 499, 506 (C. A. 2), cert. denied, 303 U. S. 646.

## **B. Cross-Examination of Other Defense Witnesses**

### **1. CHIYEKO ITO**

Appellant contends that the Government was permitted to cross-examine her witness Chiyeko Ito about conversations with appellant, the subject matter of which had not been touched upon during the direct examination, and that the prosecutor had, in the course of such examination, misstated the record (Br. pp. 199-200, 235-237).

Chiyeko Ito had testified on direct examination about many conversations which she had with appellant during the period from February 1942 through August 1945 (40

Tr. 4506-4507, 4510, 4512, 4514-4515, 4516, 4517, 4518). The testimony related to those parts of appellant's conversations with the witness which were concerned with appellant's attitude toward the Japanese, the retention of her American citizenship, a belief that America would win the war, and a desire to return to the United States (40 Tr. 4508-4510, 4511, 4512, 4514, 4515). The cross-examination was directed at these very conversations in an effort to ascertain what else the appellant had said (40 Tr. 4525). This examination brought out the fact that appellant had talked about her work at Radio Tokyo (40 Tr. 4525-4526, 4527), and the Government then questioned the witness about the conversations with appellant relative to appellant's work at Radio Tokyo (40 Tr. 4529), her attitude toward such work, and her desire to return to the United States (40 Tr. 4531-4532).

Since the direct testimony was obviously directed to the issue of appellant's intent, it was appropriate for the prosecution to bring out everything which appellant had said in the conversations which might bear upon the issue of intent. Therefore, the cross-examination was a continuation and exploration of the conversations about which the witness had testified on direct and was material on the question of appellant's criminal intent, *Chandler v. United States*, 171 F. 2d 921, 944 (C. A. 1), cert. denied, 336 U. S. 918.

Not only was the cross-examination proper as related to the question of appellant's intent, and thus qualifying and modifying the effect of the direct testimony as to that issue, but it was also permissible under the rule which permits an adverse party to bring out the details of conversations to which the witness has testified on direct examination, *Gerard v. United States*, 61 F. 2d 872, 875 (C. A. 7). This is particularly appropriate where, as here, counsel for the defense had brought out only such parts of the conversation as were favorable to the accused, *Banning v. United States*, 130 F. 2d 330, 338 (C. A. 6), cert. denied, 317 U. S. 695.

Although the prosecutor inadvertently stated that "She answered on direct examination from 1942 to 1945 she talked about her announcing" (40 Tr. 4529), there was no deliberate misconduct on his part. The prosecutor was not questioning the witness but was responding to an objection. He had previously agreed with the court that "there was no testimony developed concerning any conversations in relation to her work at the radio station" (40 Tr. 4528). The statement, therefore, could not have misled the court, and as it was not addressed to the witness no harm ensued to appellant.

## 2. REYES

Appellant asserts that the prosecutor, *once* in cross-examining her and *once* in the cross-examination of the defense witness Reyes, called for a "yes" or "no" answer and then refused to afford the witness an opportunity to explain the answer given (Br. p. 200). Appellant, when asked if she had ever been naturalized as a Portuguese (47 Tr. 5285), gave evasive answers to the question propounded (47 Tr. 5286, 5287, 5288), and *was* allowed to explain her answer (47 Tr. 5288).

Appellant's witness Reyes repeatedly testified falsely under oath (33 Tr. 3752, 3753, 3754, 3757, 3788). The court gave him an opportunity not only to explain his answer to the question complained of, but also to explain why he had given false testimony (33 Tr. 3788; 35 Tr. 3969). On redirect, Reyes was again given ample opportunity to explain the falsity of his testimony (34 Tr. 3886-3898). The cross-examination of Reyes was performed in such a manner as to clarify his testimony and bring out the truth concerning essential facts. Appellant's rights were not prejudiced by the Government's cross-examination of this witness, or by the court's rulings on her objections to that cross-examination, *Todorow v. United States*, 173 F. 2d 439 (C. A. 9), cert. denied, 337 U. S. 925.

Appellant objects (Br. p. 232) because, in cross-examining Reyes, the prosecution asked him whether Ince had

married a Filipino woman (32 Tr. 3706). On direct examination Reyes had testified at length about his personal and working relations with Ince, and also concerning Ince's activities at Radio Tokyo (32 Tr. 3588, 3589, 3590, 3598, 3599, 3600). The purpose of the question was to test the credibility of the witness. Reyes answered that he did not know whom Ince had married (32 Tr. 3706, 3707). The Government had used witnesses of various races and nationalities, one of whom, Villarin, was a Filipino. Reyes was himself of Philippine extraction and had married a girl of Japanese extraction (32 Tr. 3703-3704). The question and answer, therefore, caused appellant no harm, *Ross v. United States*, 93 F. 2d 950 (C. A. 7). The trial court's ruling on the objection was one that was well within its sound discretion.

Appellant lists many instances in which she asserts that error was committed in the cross-examination of her witness Reyes (Br. pp. 237-241). Many of these allegations require little answer and scant attention. Reyes was a Philippine national who collaborated with the Japanese at Radio Tokyo (Ex. 52, 54) and who admitted having given false testimony (33 Tr. 3752, 3753, 3754). At the time of the trial he was 27 years of age and had had three years of university training (33 Tr. 3702).

Appellant contends (Br. p. 237) that after the Government elicited testimony from Reyes that his statements in exhibit 52 were not true (33 Tr. 3748), it was improper to ask him if he had not testified previously that the statements in exhibit 52 were true (33 Tr. 3749). Appellant asserts that such a question was putting words into the mouth of the witness because the witness had not previously testified that the contents of exhibit 52 were true. The record discloses the contrary. Reyes not only testified that everything he told the agents of the Federal Bureau of Investigation was true (32 Tr. 3688; 33 Tr. 3739), but that the statement he gave to the special agents was true (33 Tr. 3746).



Appellant urges (Br. p. 240) that the cross-questioning of Reyes found at 33 Tr. 3747-3748 was argumentative. Here the Government was seeking merely to determine the verity of the contents of a signed statement given by Reyes to special agents of the Federal Bureau of Investigation (Ex. 52), which signed statement contradicted and was inconsistent with the testimony of the witness on direct.

Appellant maintains that Reyes should not have been cross-questioned as to the truth of the statements in exhibit 54 (another statement he had given to agents of the Federal Bureau of Investigation) without the document being exhibited to him in open court (33 Tr. 3769-3770). The Government did show the exhibit in question to the witness (33 Tr. 3821, 3823), and on redirect he was given full opportunity to explain the facts and circumstances surrounding its execution (34 Tr. 3915-3936). Appellant makes a like complaint (Br. p. 240) concerning the script (Ex. 53) of one of Reyes' broadcasts, but the record shows that this script was shown to the witness (33 Tr. 3777) and that he was afforded an opportunity to read it before it was admitted in evidence (33 Tr. 3778).

Appellant argues that it was error for the Government to ask Reyes on cross-examination if certain exhibits marked for identification (Ex. 55, 62, 63) were, purported to be, or appeared to be scripts of the Zero Hour program (34 Tr. 3839, 3840, 3868, 3869, 3870). Reyes had been one of the participants in the Zero Hour program (32 Tr. 3596, 3601), and it was perfectly proper for the Government at this juncture to endeavor properly to identify the scripts through him. In any event no prejudice ensued to appellant, because Reyes did not sufficiently identify the exhibits to warrant their introduction in evidence. Of said three scripts, only one (Ex. 63) went into evidence, and that on rebuttal through Government witness Roth (52 Tr. 5851).

Despite Reyes' testimony on direct that he had read all of defendant's scripts (32 Tr. 3620, 3621) and that he was also present every time she broadcast (32 Tr. 3621), appel-

lant contends (Br. p. 241) that it was improper to permit the Government to cross-question him as to what he said over the microphone on the Zero Hour program. Reyes was not asked at this point about the identification of radio scripts, but as to what he himself had said over the microphone (34 Tr. 3837, 3838, 3843, 3844, 3845). The cross-examination was proper and appropriate as going to the interest and credibility of the witness, *Chandler v. United States*, 171 F. 2d 921, 944 (C. A. 1), cert. denied, 336 U. S. 918; *Alberty v. United States*, 91 F. 2d 461, 464 (C. A. 9). It was also proper cross-examination for the purpose of negating the direct testimony of the witness that the Zero Hour program was only an entertainment program (32 Tr. 3601). Indeed, the entire cross-examination of Reyes, and the scope thereof which was allowed the Government, was a matter which rested in the sound discretion of the trial court, and the record does not disclose any abuse of discretion in that regard, *Madden v. United States*, 20 F. 2d 289, 292 (C. A. 9), cert. denied, sub nom. *Parente v. United States*, 275 U. S. 554; *Brady v. United States*, 20 F. 2d 400, 403 (C. A. 9), cert. denied, 278 U. S. 621. In view of the fact that Reyes repeatedly confessed having given false testimony it was not an abuse of discretion for the court to permit the Government some leeway in its endeavor to bring out as much of the truth as was possible under the circumstances.

### 3. WALLACE INCE

Appellant asserts (Br. pp. 231-232) that the Government indulged in race prejudice because in cross-examining her witness Ince, the prosecutor referred to her as a "Japanese" (31 Tr. 4543). Shortly before the question objected to was propounded, the witness had referred to appellant as a Japanese (31 Tr. 3533). The Government's reference to appellant as being Japanese was for the obvious purpose of distinguishing between the Japanese employees at Radio Tokyo and employees of other nationality.

No prejudice could possibly have resulted from this reference to appellant, since her racial origin was quite apparent. On direct examination the appellant herself readily testified to facts showing that she was of Japanese ancestry (44 Tr. 4909, 4911, 4914, 4915, 4916, 4917, 4918).

## VIII

### **The Trial Court Did Not Improperly Exclude Material and Relevant Evidence Offered by Appellant**

#### **A. Evidence Directly Offered**

##### **1. CITIZENSHIP**

Appellant sought to prove that while at Sugamo Prison from December 1945 until October 1946, she was "classified" as a Japanese national insofar as the mail privileges were concerned and that she received the mail privileges usually accorded to a Japanese or Portuguese national (43 Tr. 4707, 4708, 4719). She also offered to prove that after she was released from Sugamo the Japanese officials issued her the ration card of a Portuguese and not that of an American citizen (44 Tr. 4849). A similar offer of proof was made by her counsel while appellant was testifying on her behalf (47 Tr. 5225, 5226). She argues that such evidence indicates that the Government doubted her status as an American citizen and that it was improperly excluded (Br. p. 215-216).

Objections to these offers were properly sustained, since they called for conclusions, were not the best evidence, were hearsay, and were otherwise incompetent. The action of Japanese officials obviously was not evidence of the views of this Government or its officials. Nor do the mail privileges accorded her while in Sugamo indicate that this Government had made any official decision as to her status. At best, they were only evidence of conclusions arrived at by some person unknown. Furthermore, her offer related to events occurring long after the period of time set forth

in the indictment and thus had no bearing on her status at the time of the commission of the offense.

In view of her counsel's statement at the trial that: "She never had Japanese nationality. It is an absolute impossibility as a matter of law" (47 Tr. 5242), and her own testimony that she never thought she had Japanese nationality (47 Tr. 5243) and that while working at Radio Tokyo she represented herself as an American citizen (47 Tr. 5248), it is apparent that appellant was not defending on the ground of Japanese citizenship. Her marriage on April 19, 1945 (43 Tr. 4759), which constituted her only possible claim to derivative Portuguese nationality,<sup>35</sup> took place six months after the commission of the overt act which the jury found proved. Therefore, the exclusion of the evidence in question could not have had any possible prejudice to her, since she could not possibly have acquired Portuguese citizenship at the time she committed overt act 6, and she never claimed Japanese nationality but consistently and repeatedly denied having acquired it.

## 2. EVIDENCE THAT APPELLANT'S BROADCASTS WERE HARMLESS AND POSSIBLY BENEFICIAL TO UNITED STATES MORALE

Appellant offered certain evidence to the effect that her broadcasts were either beneficial to the morale of American military men or were harmless. The evidence so offered was excluded upon the Government's objection thereto and she now argues that it was admissible to prove that her broadcasts were calculated to aid the United States and injure Japan (Br. pp. 200-205). However, at the trial appellant did not advance that reason as justifying the admission of the evidence offered (40 Tr. 4560-4561; 39 Tr. 4348; 40 Tr. 4455-4456; 50 Tr. 5596-5599).

Regardless of how appellant twists the reason for offering this type of evidence, it was incompetent and immaterial. The success or failure of the treasonable plan is immaterial. She cannot prove her intent by what some listen-

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<sup>35</sup> Title 8 U. S. C. §§ 801, 808.



ers thought about her broadcasts. Whether it was considered as poisonous propaganda or uplifting entertainment by the American armed forces, proves nothing as far as her intent was concerned.

It is well settled that the traitorous plan does not have to be successful in order to warrant a conviction, *Chandler v. United States*, 171 F. 2d 921, 941 (C.A. 1), cert. denied, 336 U.S. 918; cf. *Gillars v. United States*, 182 F. 2d 962, 977 (App. D.C.). In *Haupt v. United States*, 330 U.S. 631, 644, the Supreme Court stated:

His acts aided an enemy of the United States toward accomplishing his mission of sabotage. The mission was frustrated but defendant did his best to make it succeed.

From the earliest days of our Republic down to the latest treason trial, it has been held by the various courts that the act of treason need not have been successful in order to subject the defendant to conviction for commission of that act. The earlier Federal cases concerning this subject are: *United States v. Greathouse*, 4 Sawy. 457, Fed. Cas. No. 15254 (C.C., D. Cal.); *United States v. Pryor*, 3 Wash. C.C. 234, Fed. Cas. No 16096 (C.C., D. Pa.). See also charge on the law of treason, 1 Story 614, Fed. Cas. No. 18275 (C.C., D. R.I.). In *United States v. Greathouse*, *supra*, Mr. Justice Field stated as follows:

It is not essential to constitute the giving of aid and comfort that the enterprise commenced should be successful and actually render assistance. . . .

Wherever overt acts have been committed which in their natural consequence if successful, would encourage and advance the interests of the rebellion, in judgment of law, aid and comfort are given. Whether aid and comfort are given—the overt acts of treason being established—is not left to the balancing of probabilities—it is a conclusion of law.

In Mr. Justice Story's charge to the Grand Jury for the District of Rhode Island at the time of the Dorr War, 1 Story 615, 616 (30 Fed. Cas. at 1047), he stated in part as follows:

. . . To constitute an actual levy of war, there must be an assembly of persons, met for the treasonable purpose, and some overt act done, or some attempt made by them with force, to execute or towards executing that purpose. There must be a present intention to proceed in the execution of the treasonable purpose by force. The assembly must now be in a condition to use force, and must intend to use it, if necessary, to further, or to aid, or to accomplish the treasonable design. If the assembly is arrayed in a military manner,—if they are armed and march in a military form, for the express purpose of overawing or intimidating the public,—and thus they attempt to carry into effect the treasonable design,—that will of itself, amount to a levy of war, although no actual blow has been struck, or engagement has taken place.

Likewise, the English cases have uniformly held that treason need not be successful. In *Trial of De La Motte*, 21 How. St. Tr. 687, 808, and *The King v. William Stone*, 6 T.R. 527, 529, 530, it was pointed out that sending or collecting intelligence for the purpose of sending it to an enemy though it never be delivered to the enemy, constitutes treason. In *Trial of Captain Vaughan*, 13 How. St. Tr. 485, the defendant was charged with levying war and adhering to the King's enemies, but as Holt, L.C.J., observed (13 How. St. Tr. at 532), "the adhering to the King's enemies is principally insisted on." The overt act of adherence alleged was that of cruising in a small ship of war, in English waters, in the service of France, with intent to take the King's ships while France and England were at war. Counsel for the defendant attacked the sufficiency of the indictment (13 How. St. Tr. at 531):

For it is said only he went a-cruising; whereas they ought to have alleged that he did commit some acts of hostility, and attempted to take some of the King's ships; for cruising alone cannot be an overt act.

But the judges were of the opinion that the indictment was sufficient. Treby, L.C.J., said (p. 533):

. . . and if this be not adhearing, etc., it may as well be said, that if the same persons had made an attack upon our ships, and miscarried in it, that had not been so neither; because that in an unprosperous attempt there is nothing done that gives aid or comfort to the enemy. *And after this kind of reasoning they will not be guilty, till they have success; and if they have success enough, it will be too late to question them.* [Italics supplied.]

Moreover, the evidence offered by appellant was inadmissible for other reasons, which were the basis of the Government's objections.

Through a warrant officer who was in the Judge Advocate General's Department, Alaska Defense Command (40 Tr. 4557), appellant sought to introduce oral evidence to show the contents of certain confidential Army bulletins relative to the success of appellant's broadcasts (40 Tr. 4559, 4560). Appellant contends that if this testimony had not been erroneously rejected by the trial court, it would have disclosed that her broadcasts were beneficial to the morale of American troops (Br. p. 201). No attempt was made by appellant to produce the bulletins themselves or to account for their absence. The testimony offered was not the best evidence, was hearsay, called for a conclusion, and was consequently incompetent. Much of the time at the trial was consumed by appellant's offer of such palpably inadmissible evidence, which entailed argument for and on behalf of both parties and a court ruling on the evidentiary matter in dispute.

Defendant's exhibit BV for identification was a Navy press release and purported "citation" of appellant. Appellant complains of its rejection (Br. p. 202). It apparently was issued in a jocular vein, and speaks of the alleged morale-building contents of appellant's broadcasts. At the trial the United States waived any objection to the document on the ground that it was not properly authenticated or certified (50 Tr. 5596). This waiver legally meant that the document was equally admissible with the original, but inadmissible if the original itself was not competent, if produced, Title 28 U.S.C. (Rev.) § 1733; *Ex parte La Mantia*, 206 Fed. 330, 332. The exhibit in question was hearsay of the rankest sort, contained conclusions, and was not properly identified, or at all (50 Tr. 5596, 5597, 5598, 5599). It was obviously patently inadmissible, and its rejection appears so proper as not to warrant any further argument on the point.

Appellant contends that she was erroneously precluded by the trial court (Br. p. 203) from showing that her broadcasts were similar to those of the American armed forces radio program. The only question propounded to defense witness Paul in this regard was whether the music on the Zero Hour program and armed forces radio program was substantially the same. The question was too general, was obviously immaterial, and had no bearing on any issues in the case.

Appellant states (Br. p. 204) that she tried to prove that American troops were never ordered not to listen to her program, but that the court refused to permit her to elicit this type of testimony from her witness Stanley. Appellant was likewise not permitted to question Stanley as to whether any of his superiors had informed him that Orphan Ann was Tokyo Rose (39 Tr. 4348). This testimony, which it is contended the court erroneously excluded, was hearsay, immaterial, and not germane to any of the issues in the case.



## 3. EVIDENCE CONCERNING TREATMENT OF PRISONERS OF WAR

Appellant contends (Br. p. 210) that she was not allowed to introduce evidence that aid to Allied prisoners was contrary to the policy of the Japanese Government, although the prosecution was permitted to introduce evidence designed to "take the edge off the proof" that she aided Allied war prisoners. On cross-examination of Cousens, one of appellant's main witnesses, the Government offered in evidence a greeting card to a Japanese guard (30 Tr. 3420, 3421). This card (Ex. 47) showed Cousens' friendly attitude toward the guard (30 Tr. 3420), and was admissible as affecting Cousens' interest and credibility as a witness. Appellant says in this connection that she should have been allowed on cross-examination to question Government witness Ishii as to the circumstances under which Ishii and appellant were refused admission to Bunka prison camp. The questions regarding this matter which appellant propounded to Ishii were improper, since they went far beyond the scope of the direct examination (18 Tr. 1856). On direct examination, Ishii had testified only with reference to appellant's activities at Radio Tokyo and the commission by appellant of overt act 7 pleaded in the indictment (17 Tr. 1824, 1831).

Appellant states (Br. p. 211) that proof of systematic starvation of Allied prisoners at Bunka prison camp offered through her witness Cox was improperly excluded. Cox was an American Army officer who had been held by the Japanese as a prisoner of war at Camp Bunka, who never participated in the Zero Hour, never saw or heard that program, and did not know and had never seen the appellant (37 Tr. 4267, 4268). Appellant specifically complains because this witness was not permitted to testify whether instructions had been issued prohibiting the prisoners of war at Camp Bunka from talking to women at Radio Tokyo (37 Tr. 4260). The questions along this line were wholly collateral, possessed no probative value, and injected extraneous issues into the record which, in effect, would have

required the trial court to try another case. The lower court very properly refused to permit the trial to be diverted to the consideration of collateral issues, *Meeks v. United States*, 179 F. 2d 319, 321 (C.A. 9); *Local 36 of International Fishermen, etc. v. United States*, 177 F. 2d 320, 332 (C.A. 9), cert. denied, 339 U.S. 947; cf. *May v. United States*, 175 F. 2d 994, 1008, 1009 (App. D.C.), cert. denied, 338 U.S. 830.

Furthermore, the evidence offered did not show the official policy of the Japanese Government but only what were the actions of minor subordinates, such as prison or hospital guards.

#### 4. EVIDENCE CONCERNING OTHER BROADCASTS

Appellant claims (Br. p. 215) that the prosecution was allowed to give evidence of broadcasts taking place over a nine-hour period but that her rebuttal was limited to broadcasts taking place over a one-hour period. Her statement of the Government's evidence is not entirely correct, since that evidence dealt solely with appellant's broadcasts, the witnesses testifying that they were listening to the appellant's voice on the Zero Hour program (20 Tr. 2023-2025, 2111-2112, 2113, 2116; 19 Tr. 1972-1976; 21 Tr. 2217, 2220-2224, 2244, 2248-2250; 26 Tr. 2887-2889, 2895, 2898, 2901, 2903-2904). Many of these witnesses were unable to fix the exact hour of the evening during which they heard appellant broadcast (26 Tr. 2961, 2820, 2890). As one of the witnesses testified: "Time was not a main factor to them then" (26 Tr. 2890). These American veterans, some of whom knew appellant, positively identified her voice on recordings in evidence as the voice they heard in the South Pacific.

Contrary to her contention, appellant was given a very wide latitude with respect to the introduction of evidence designed to negative the testimony of these witnesses. For example, appellant's witness Hagedorn testified concerning broadcasts emanating from Manila, Java, Saigon,

Shanghai, and Australia (38 Tr. 4403). Her witness Welker testified about picking up broadcasts coming from Germany (38 Tr. 4398). And witness Gallagher was permitted to testify about broadcasts from Manchukuo, Rangoon, Batavia, Siam, Malaya, and Hongkong (39 Tr. 4387, 4388).

However, her counsel sought to introduce evidence as to the contents of numerous other broadcasts emanating from points far distant from Tokyo involving other persons. This was not germane to the issues involved and related to collateral and extraneous matters, thus necessitating the exercise of some judicial restraint so that the jury would not be misled. Therefore, appellant's contention that her proof in this regard was unduly limited is utterly without foundation.

#### 5. EVIDENCE CONCERNING RUMORS

Appellant makes an absurd argument that she should have been permitted to introduce evidence of rumors among the armed forces concerning matters broadcast over Radio Tokyo (Br. p. 211). Typical examples of the hearsay thus sought to be elicited will be found in the record testimony of her witnesses Stanley and Gupta, who neither knew appellant nor had any personal knowledge concerning her broadcasting activities. While Gupta was in Honolulu he had not listened to any foreign shortwave radio broadcasts (39 Tr. 4413). Yet appellant's counsel persisted in asking the witness what rumors he had heard and whether he had heard the name Tokyo Rose (39 Tr. 4414). Although her witness Stanley was not acquainted with appellant and possessed no personal knowledge of her broadcasting activities, appellant's counsel insisted they had the right to delve into hearsay and elicit testimony from witness Stanley as to a discussion he heard among American troops at Dutch Harbor, Alaska, concerning a person designated as "Tokyo Rose." The trial court properly disagreed (39 Tr. 4341, 4342).

Appellant says that this testimony was admissible for the purpose of showing that the testimony of certain Government witnesses who were American veterans was based on rumor. But the American veterans listed at page 214 of appellant's brief positively identified appellant's voice on certain recordings (Exs. 16-21) as the voice they had heard in the South Pacific. Three of the witnesses named, i.e., Velasquez, Cowan, and Henschel, knew appellant personally and had personally conversed with her either prior or subsequent to her broadcasting activities at Radio Tokyo.

#### 6. EVIDENCE CONCERNING THE GOVERNMENT'S USE OF SUBPOENAS

Appellant feels aggrieved (Br. p. 205) because a Government objection to her blanket offer in evidence of subpoenas issued to certain Government witnesses was sustained (50 Tr. 5590). The subpoenas in question disclosed that the attendance of some Government witnesses was required a few days in advance of the commencement of the trial below. The offer was made to show an abuse of judicial process by the prosecution (50 Tr. 5588).

Appellant was not in any manner harmed by the court's rejection of her offer, because several exhibits of the same type were admitted by the court (Exs. V, CC) and because the claim of abuse of judicial process is obviously without merit. The right claimed, the protection invoked, is personal to the witness subpoenaed. Assuming, but not conceding, that the obtainment of the subpoenas in question was improper, the witnesses subpoenaed, and not appellant, are the only persons that could be heard to complain, *Wilson v. United States*, 221 U.S. 361; *Sachs v. Government of the Canal Zone*, 176 F. 2d 292, 296 (C.A. 5), cert. denied, 338 U.S. 858; *Remus v. United States*, 291 Fed. 501, 511 (C.A. 6); *Haywood v. United States*, 268 Fed. 795, 803, 804 (C.A. 7), cert. denied, 256 U.S. 689.



## 7. EVIDENCE RELATING TO ALLEGED ACTIVITIES OF BRUNDIDGE

Appellant unsuccessfully sought to make a vicious attack on the integrity of the Government and its prosecutors by offering testimony that one Harry Brundidge had engaged in unsavory conduct in Japan. She now asserts the refusal of the court to permit her to introduce such testimony was error (Br. pp. 207-209). Her theory is that Brundidge's conduct constituted fraud by the Government in the preparation of its case and that she should have been permitted to show it.

However, she utterly failed to lay responsibility for Brundidge's acts upon the Government's doorstep. When proof is offered under the theory adopted by appellant, it is necessary to show the party's authority or connivance with corruption. There must be very definite evidence of knowledge, connivance, participation, or ratification, *McHugh v. Audet*, 72 F. Supp. 394, 405. No mere technical theory of agency will suffice to charge the party, *Wigmore*, 3rd Ed., § 280.

Brundidge was not a Government witness but was available in San Francisco as a defense witness if appellant wished to call him. This fact was made known to appellant's counsel during the trial (8 Tr. 596; 50 Tr. 5569, 5586) and, although she did not call him, appellant's counsel was in possession of Brundidge's passport<sup>36</sup> and sought to identify it through John Hogan. Appellant now claims the court erroneously refused to admit the passport in evidence (Br. p. 207). However, the record discloses that her offer of this exhibit was for identification only (50 Tr. 5580). The offer of the passport as an exhibit was thus either withdrawn or never properly made.

The evidence offered by appellant did not disclose that Brundidge was a Government employee or agent, and she did not offer even a scintilla of evidence indicating in any

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<sup>36</sup> Exhibit BR for identification.

way that the Government had knowledge of or had authorized, ratified, or participated in the conduct which she attributes to Brundidge. Brundidge had offered to accompany John Hogan, a Department of Justice attorney who went to Japan in 1948 for the purpose of interviewing appellant. The Attorney General accepted Brundidge's offer in this regard and paid his plane fare only. He was a newspaperman and not an agent of the Department of Justice. (8 Tr. 630, 631; 50 Tr. 5578.)

On this state of facts the court very properly refused to let the jury hear any collateral evidence concerning Brundidge's alleged illegal activities in Japan, *Lau Fook Kau v. United States*, 34 F. 2d 86 (C.A. 9). Brundidge was available as a witness, and appellant could have called him herself to prove his official status, if any, but she saw fit not to do so.<sup>37</sup> Thus, the evidence actually offered by appellant in connection with this matter was entirely collateral and constituted improper impeachment of a person who had never taken the witness stand for either party.

The same conclusion has been reached by the Court of Appeals for the Fifth Circuit in *Burton v. United States*, 175 F. 2d 960, cert. denied, 338 U.S. 909, wherein the court made the following observation (p. 966):

Burton offered to prove that certain revenue agents in 1938 had threatened him about tax matters. Another revenue agent had said to a third party he was going to "shake down" Burton; and an Assistant to the United States Attorney General in Washington, after the Burton tax evasion mistrial had said: "I will get this man Burton, if it is the last thing I do." *Neither of these was a witness in the present trial, nor was the*

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<sup>37</sup> Although the record does not disclose how appellant's counsel obtained possession of Brundidge's passport, it is logical to assume there must have been some medium of communication between them, and it might be inferred that Brundidge was not likely to support *any* of the allegations which appellant here makes with respect to his connection with the Government or his conduct in Japan.

*named Assistant to the United States Attorney General conducting it. The Court correctly held their remarks were irrelevant. [Italics supplied.]*

The recent statement of this court in *Meeks v. United States*, 179 F. 2d 319, 321 (C.A. 9), relative to the exclusion of evidence pertaining to collateral issues, is likewise persuasive. In that case this court stated as follows (p. 321):

The purpose of defendant (appellant) was not to place before the jury evidence that because witness Hartness had been assaulted by appellant, his hatred, ill will and hostility toward appellant was intensified, rather the purpose was to establish that the charges made by Hartness were false, and were motivated by hostility and ill will. The lower court very properly refused to permit the trial to be diverted to the consideration of collateral issues.

*Hicks v. Hiatt*, 64 F. Supp. 238, cited by appellant, is not at all in point. That was a *habeas corpus* case turning on the interpretation of various Articles of War and certain paragraphs of the Army courts martial manual.

Appellant says (Br. p. 208) that, since the witness Clark Lee based his testimony on Brundidge's notes, the court should have allowed her to impeach Brundidge in the manner attempted. A complete answer to this is that the record discloses that Lee typed his own notes (7 Tr. 482). There was only one instance when Lee testified concerning a statement by appellant which was referred to in Brundidge's and not Lee's notes. And in this instance the record discloses that Lee's testimony as to propaganda broadcast by appellant was based on his own recollection and not on any notes made by Brundidge. Those notes were not used at the trial (7 Tr. 483, 485, 486; 8 Tr. 652, 653, 654). Appellant's statement (Br. p. 209) that Lee's testimony is based on Brundidge's notes is therefore not borne out by the record, and

her argument that she was entitled to impeach hearsay statements attributed to Brundidge has no validity.

#### 8. EVIDENCE OFFERED ON DIRECT EXAMINATION OF APPELLANT

The trial court refused to permit appellant to testify what an Australian war correspondent had said about her voice (46 Tr. 5160), and she now urges that this was prejudicial error (Br. p. 232). The identity or name of the Australian correspondent was not revealed or disclosed, and what such a person said was clearly hearsay and rejected as such (46 Tr. 5161). Since the statement was made during an interview which took place on September 5, 1945, long after the cessation of the Zero Hour program (46 Tr. 5160), it could not properly be classed as a part of the *res gestae*. In order to constitute a part of the *res gestae*, the declaration or statement must be made spontaneously, at or near the time of the offense committed, and here there was on spontaneity whatever about it, *Smith v. United States*, 47 F. 2d 518, 520 (C.A. 9).

Appellant claims error (Br. p. 234) in the court's refusal to allow her to develop a conversation with newspaperman Brundidge as to the state of her health (47 Tr. 5224). However, she had previously testified as to what Brundidge said immediately before she signed exhibit 15 (47 Tr. 5222). Any conversation appellant had with Brundidge is pure hearsay. If the evidence which appellant here offered was for impeachment, it was properly rejected because Brundidge had not taken the witness stand, *Burton v. United States*, 175 F. 2d 960, 966 (C.A. 5). Here again the trial court properly refused to allow extraneous issues to creep into the case, *Meeks v. United States*, 179 F. 2d 319, 321 (C.A. 9). We have already pointed out that Brundidge was not an agent for the Department of Justice or Attorney General, as appellant contends, *supra* pp. 104-105.

Appellant feels aggrieved (Br. p. 234) because she was not allowed to testify concerning what an American Army



officer orally told her as to the terms and conditions of her release from prison in the fall of 1946 (47 Tr. 5210, 5211, 5212). The evidence sought was objectionable as calling for a conclusion, as not being the best evidence, as being hearsay, and as being too remote in time from the issues herein involved. It concerned a conversation which took place more than a year after appellant stopped broadcasting for the enemy (Ex. 13).

#### 9. EVIDENCE OFFERED THROUGH DEFENSE WITNESSES INCE AND PRAY

Appellant contends (Br. p. 235) that it was error for the trial judge to refuse her witness Ince permission to testify that he "ran the Voice of Freedom radio program at Corregidor in the early part of 1942" (31 Tr. 3498). This testimony was clearly repetitive, since the witness had previously testified that the last radio job he had before being taken a prisoner was "The Voice of Freedom at Corregidor" (31 Tr. 3497) and that he had broadcast that program at Corregidor (31 Tr. 3497). Since Ince's participation in the Corregidor broadcast was already known to the jury and since his duties on that island related to events occurring more than a year and a half prior to the inception of appellant's broadcasting activities on the Zero Hour program and had no bearing on the issues in this case, the trial court properly refused to let appellant pursue the matter further. Such a ruling was not an abuse of the court's discretion, *Johnson v. United States*, 170 Fed. 581, 583 (C.A. 1), nor was it prejudicial to appellant, particularly in view of the fact that she was given extremely wide latitude (31 Tr. 3455-3475), as disclosed by twenty pages of the record, in eliciting testimony from Ince pertaining to his activities prior to the time appellant began her treasonable activities.

Appellant contends (Br. p. 237) that the trial court erred in not allowing an Army prison attache in Japan to testify concerning mail privileges accorded to her (43 Tr. 4711,

4712). Appellant argues in her brief that she was held incommunicado, but the witness in question testified that her husband came to see her while she was in prison in Japan (43 Tr. 4712). Furthermore, the record positively discloses that this witness was permitted to testify as to the mail privileges afforded appellant and the action of the United States in lifting censorship ban on mail between the United States and Japan (43 Tr. 4714).

#### 10. EVIDENCE RELATED TO THE WORDS "TOKYO ROSE"

Appellant contends it was error to refuse to allow her to show by hearsay evidence from her witnesses Hagedorn, Whitten, Cox, and Gupta that the appellation "Tokyo Rose" was in circulation prior to appellant's broadcasting activities (Br. p. 182). The evidence excluded was rank hearsay. None of the witnesses just mentioned knew appellant or had ever seen her, and none had personal knowledge concerning the identity of "Tokyo Rose."

Since the Government did not contend that appellant broadcast under the pseudonym "Tokyo Rose" but only under the name "Ann" or "Orphan Ann" on the Zero Hour, it was obviously immaterial whether appellant's witnesses had heard persons who listened to Japanese radio programs use the appellation "Tokyo Rose" in referring to other broadcasters.

Witness Hagedorn, an amateur monitor, never heard "Orphan Ann" broadcast and never heard broadcasts of the Zero Hour program (38 Tr. 4413, 4414). Testimony from her as to what her private radio log showed as to broadcasts other than the Zero Hour was properly excluded as being immaterial and hearsay (39 Tr. 4327-4329).

Appellant's witness Whitten never heard any program called the "Zero Hour" (38 Tr. 4348). She was properly precluded from eliciting from this witness hearsay as to

what a Navy chief petty officer had told him about "Tokyo Rose" (38 Tr. 4306).

Likewise, the court acted properly in refusing to permit appellant's witness Stanley to testify concerning a conversation among American troops in Alaska (39 Tr. 4340-4342).

Appellant's witness Cox had been an American prisoner of war in Japan. He had never seen appellant (37 Tr. 4261), had never observed or heard the Zero Hour broadcast (37 Tr. 4268), and had no personal knowledge about appellant's activities at Radio Tokyo (37 Tr. 4268). Under this state of the record, the trial court pursued the proper course in not allowing this witness to testify about hearsay matters relating to gossip, rumor, and discussions with others concerning the appellation "Tokyo Rose" (37 Tr. 4243, 4244). Likewise, the trial court was obviously correct in refusing appellant's witness Gupta permission to testify concerning rumors he had heard with regard to the cognomen "Tokyo Rose."

#### 11. EVIDENCE OF THE REPUTATION OF GOVERNMENT WITNESSES

Appellant complains because she was not permitted to impeach Government witnesses Mitsushio, Oki, and Ishii by reputation evidence (Br. p. 230). But appellant did not lay the proper foundation for reputation evidence and did not propound the proper impeaching questions. She asked the impeaching witness as to the reputation of the three Government witnesses aforesaid with reference to truth, honesty, and integrity (1 R. 407, 408). The question should have been directed solely to the reputation of the Government witnesses as to truth and veracity.

In the absence of statute, the Federal courts in criminal cases are not bound by State laws or rules of evidence but are guided by common law principles as interpreted by the Federal courts in the light of reason and experience, *Federal Rules of Criminal Procedure* 26; *Funk v. United States*, 290

U.S. 371; *Wolfe v. United States*, 291 U.S. 7. For over a century the United States courts have uniformly held that the only proper way to attack the credibility of a Government witness by reputation evidence is to limit the impeaching question to the actual traits involved, i.e., "truth and veracity," *United States v. White*, Fed. Cas. No. 16,675, 5 Cranch, C.C. 38, 5 D.C. 38; *United States v. Masters*, Fed. Cas. No. 15,739, 4 Cranch, C.C. 479, 4 D.C. 479; *United States v. Dickinson*, Fed. Cas. No. 14,958, 2 McLean 325; *United States v. Van Sickel*, Fed. Cas. No. 16,609, 2 McLean 219; *Patriotic Bank v. Coote*, Fed. Cas. No. 10,807, 3 Cranch, C.C. 169, 3 D.C. 169; *Gass v. Stinson*, Fed. Cas. No. 5,261, 2 Sumn. 605; *Sawyeer v. United States*, 27 F. 2d 569, 570 (C.A. 9), cert. denied, 278 U.S. 650; *Colbeck v. United States*, 14 F. 2d 801, 803 (C.A. 8); *Colbeck v. United States*, 10 F. 2d 401, 403 (C.A. 7), cert. denied, 270 U.S. 663.

In *Powell v. United States*, 35 F. 2d 941, 942 (C.A. 9), this court, speaking through the late Judge Rudkin, stated as follows (p. 942):

Counsel for appellant asked a witness if he knew the general reputation of one of the Government witnesses in the city of Bremerton as a law abiding citizen. An objection to the question was sustained and upon this ruling error is assigned. The question was not limited to the general reputation of the witness for truth and veracity, and the ruling was therefore proper.

Furthermore, no proper foundation was laid for the objectionable reputation evidence appellant sought to elicit in the case at bar (1 R. 407, 408). The locale of the reputation as to Government witnesses Ishii and Mitsushio was not specified (1 R. 407, 408). The witness Saisho's knowledge of the Government witnesses' reputations may have been too remote, as the time of Saisho's knowledge of the same was not fixed in the impeaching questions appellant sought to propound (1 R. 407, 408).



## 12. DENIAL OF OFFERS OF PROOF

Appellant asserts that the court's refusal to allow her to make an offer of proof on several occasions was error (Br. p. 216). Although appellant already had a record on questions improperly propounded, her counsel frequently insisted, despite the court's disapproval, on making extended time-consuming offers of proof which contained improper and incompetent matter capable of influencing the jury (47 Tr. 5211, 5212; 46 Tr. 5136; 38 Tr. 4422; 39 Tr. 4385; 43 Tr. 4719; 44 Tr. 4849). She now insists that the few occasions when her counsel obeyed the directions of the court constitute prejudicial error. It would have wasted much time below if the jury were sent out each time an improper offer such as those just referred to was made by appellant's counsel. This matter was the subject of much colloquy between court and counsel. All of the offers were objectionable, but in the interest of expedition the trial court allowed many to be made in the presence of the jury. While all the authorities must and do agree that it is for the court, and not the jury, to pass upon the admissibility of evidence, there is, nevertheless, no hard and fast rule that the jury must always be withdrawn when the question of admissability of evidence is being explored, *Eierman v. United States*, 46 F. 2d 46, 49 (C.A. 10).

Contrary to appellant's contention, the rules of criminal procedure for the United States District Courts make no provision for offers of proof. *Federal Rules of Civil Procedure*, Section 43(c), does make provision for an offer of proof in a civil case, but even there the grant of permission to make such offers is discretionary with, not mandatory upon, the court. It has been held that under 43(c) *Federal Rules of Civil Procedure*, the making of a formal offer of proof was not a prerequisite to appellant's availing himself of error in the exclusion of evidence, *Meaney v. United States*, 112 F. 2d 538, 539 (C.A. 2); *Hoffman v. Palmer*, 129

F. 2d 976, 994 (C.A. 2), aff'd, 318 U.S. 109, reh. denied, 318 U.S. 800.

## **B. Evidence Offered Through Cross-Examination**

### **1. LIMITATION OF HENSCHEL'S CROSS-EXAMINATION**

Appellant complains because she was not allowed to ask Government witness Henschel whether he had an opinion as to her guilt or innocence (Br. p. 223). The testimony sought did not in any manner reflect upon the bias or interest of the witness. Appellant's authorities dealing with the cross-examination of a witness for the purpose of showing bias or interest are consequently inapposite here. The question to which a Government objection was sustained called for a conclusion from a witness who was not an expert, and invaded the province of the jury, *August v. United States*, 257 Fed. 388, 391 (C.A. 8); *Girson v. United States*, 88 F. 2d 358, 361 (C.A. 9), cert. denied, 301 U.S. 697. In *Wesson v. United States*, 164 F. 2d 50, 55 (C.A. 8), the Court of Appeals for the Eighth Circuit stated as follows (p. 55):

Ordinarily there is no reason to admit opinion evidence on a matter that is fully capable of proof and comprehension from available fact testimony. And any such unnecessary opinion evidence in a criminal case that will inescapably be a plain expression of the witness' opinion of the defendant's guilt, even though by circumlocution, should be scrupulously avoided.

### **2. LIMITATION OF LEE'S CROSS-EXAMINATION**

Appellant contends (Br. p. 219) that the trial court erroneously refused to permit her on cross-examination to ask Government witness Lee if he had not written a book in which he stated that appellant's broadcasts were entertaining. Lee first saw appellant in September 1945 (7 Tr. 528) and had never heard appellant's broadcasts (8 Tr. 588). The question which the Government objected to called

for a conclusion, sought to elicit hearsay testimony, and was therefore properly ruled out. Lee was not on the stand as an expert, and cross-questioning of him about conclusions and hearsay in his book was obviously improper.

Appellant complains (Br. p. 221) that the trial court improperly refused to allow her to question Government witness Lee as to what an Army officer had told him about "Tokyo Rose." The testimony sought was palpable hearsay and was properly excluded (7 Tr. 554).

Appellant contends (Br. p. 222) that it was error for the trial court to refuse to allow her counsel to ask the witness Lee if it had been possible for appellant to obtain counsel at the time of her interview with Lee. The question propounded (8 Tr. 625) was improper, since it called for a conclusion. Lee did not obtain any confession from appellant, but had interviewed her in his private capacity as a war correspondent (7 Tr. 479). At the time of the interview, appellant's husband was present (7 Tr. 479), and she was not at that time incarcerated; nor were any criminal proceedings then pending against her.

### 3. LIMITATION OF CROSS-EXAMINATION OF NII, VILLARIN, AND HALL

Appellant complains (Br. p. 225) because the court would not permit her to cross-examine Government witness Nii with reference to how much liquor he customarily drank in the spring of 1949, when appellant's counsel was in Japan (25 Tr. 2737). Appellant was not prejudiced by this exclusion because Nii had already testified that he was quite used to drinking (25 Tr. 2736).

On cross-examination this witness stated he did not remember what he said to appellant's counsel at an interview in the spring of 1949 because he (witness) was intoxicated at the time (25 Tr. 2726, 2727). Nii testified on redirect that the liquor for this occasion was furnished by one of appellant's counsel (25 Tr. 2733, 2734) who had gone

to Japan in the spring of 1949 at Government expense (51 Tr. 5720, 5721).<sup>38</sup>

On recross-examination Nii was asked how much liquor he customarily consumed in the spring of 1949, and Government objections to this line of questioning were sustained (25 Tr. 2737). The rulings on this improper type of attempted impeachment were well within the trial court's discretion, *Sawyear v. United States*, 27 F. 2d 569, 570, 571 (C.A. 9). For impeachment purposes extrinsic testimony as to particular acts is universally conceded to be inadmissible, *Shively v. United States*, 299 Fed. 710, 713 (C.A. 9), cert. denied, 266 U.S. 619. This court has held that testimony from other witnesses of particular instances of misconduct is an improper mode of discrediting, because of the confusion of issues and waste of time that would thus be involved, *McKune v. United States*, 296 Fed. 480, 481 (C.A. 9). Furthermore, the evidence as to witness Nii's drinking proclivities was first injected into the case by appellant and not by the United States (25 Tr. 2726, 2727, 2728).

Appellant feels aggrieved (Br. p. 225) because she was not allowed to interrogate Government witness Villarin as to the identity of Japanese officers who had threatened him (26 Tr. 2858). The matter had not been delved into on direct examination and therefore was not a proper subject for cross-examination. Government witness Villarin testified on direct examination that he was sent to Japan in 1943 by the Japanese Army for purposes of indoctrination (26 Tr. 2850), but did not testify as to any Japanese threats against him compelling him to proceed to Japan. The exclusion of testimony along that line in cross-examination was therefore a matter that rested in the sound discretion of the trial

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<sup>38</sup> Despite appellant's false assertion to the contrary (Br. pp. 131-132) the Government had, long prior to the trial, advised appellant's counsel of the identity of the Japanese whom the United States intended to bring to this country as witnesses (51 Tr. 5723), and appellant's counsel interviewed all these Government witnesses, including Nii, prior to trial (51 Tr. 5723).



court, *Kettenbach v. United States*, 202 Fed. 377, 387 (C.A. 9), cert. denied, 229 U.S. 613; *Aplin v. United States*, 41 F. 2d 495, 496 (C.A. 9).

Appellant contends (Br. p. 226) that the trial court erred in refusing to permit her to cross-examine Government witness Hall as to whether he heard any radio broadcasts from a Japanese-controlled radio station at Rabaul (26 Tr. 2942). This was not proper cross-examination and was an attempt to divert the trial into collateral issues.

Sergeant Hall of the American Air Force identified appellant's voice on exhibits 16 to 21, inclusive, as the voice he heard broadcast when he was in the South Pacific (26 Tr. 2888, 2889, 2891), and testified on direct as to the context of appellant's broadcasts which he had heard (26 Tr. 2892, 2899, 2902). He did not testify on direct examination regarding any broadcasts emanating from Rabaul. Hall testified on cross-examination that he was never stationed at Rabaul, had never visited there, did not know where Rabaul was situated, and did not know that there was a Japanese-controlled radio broadcasting station at Rabaul (26 Tr. 2941, 2942). With the record in this state, it was proper for the trial judge to refuse appellant permission to cross-examine Hall any further concerning alleged Japanese broadcasts coming from Rabaul. The witness had not testified about the matter on direct and disclaimed personal knowledge of any such broadcasts on cross. To have permitted appellant to go into broadcasts from Rabaul not only would have injected into the case matters wholly foreign to the issues on trial, *Nardi v. United States*, 13 F. 2d 710, 711 (C.A. 6), but would have permitted appellant to ask about a subject concerning which the witness had no knowledge.

**C. The Court Properly Refused to Permit Appellant to  
Inspect Reports Made by the Federal Bureau  
of Investigation to the Prosecutor.**

Appellant insists that she was entitled to examine an investigative report made by Federal Bureau of Investigation Agents Dunn and Tillman to the United States Attorney because it contained their account of what defendant's witness Normando Reyes had said about his personal history (Br. pp. 228-230). The statement of the facts which forms the basis of her argument (Br. p. 228) is not entirely correct. Thus, appellant creates the impression that what she was seeking was another statement by Reyes (Br. p. 228) when in fact she was actually trying to obtain an account of Reyes' oral story about his personal history. Although Tillman's testimony is not clear (51 Tr. 5784-5785), the colloquy between counsel makes it perfectly clear that appellant's counsel, the prosecutor, and the court were not talking about a written statement by Reyes, but were referring to notes or Federal Bureau of Investigation reports containing an account by the special agents of Reyes' oral narration of his personal history (51 Tr. 5786-5793).<sup>39</sup>

Appellant flatly accuses Tillman of perjury, charging he had denied the existence of the "statement" (Br. p. 228). She points to 51 Tr. 5758-5759 as substantiating this accusation; but Tillman there testified that he personally did not make any notes and that he did not recall whether Dunn had made any notes. It later developed that Special Agent Dunn had made notes of the conversation with Reyes which he destroyed after he had made a report of the matter (51

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<sup>39</sup> Appellant's counsel twice demanded production of a "confidential report made to the United States District Attorney in San Francisco, dated October 5, 1948, which refers in part to the witness Norman Reyes and which contains notes made by Federal Bureau of Investigation Agents John Eldon Dunn and/or Frederick G. Tillman relating to oral statements made to them or either of them on or about October 5, 1948, by Norman Reyes" (51 Tr. 5786, 5792).

Tr. 5816), this being in accordance with his usual practice (51 Tr. 5817).<sup>40</sup>

The facts are that on direct examination Tillman had testified relative to the voluntary execution of exhibits 52 and 54 by the witness Reyes (51 Tr. 5745-5751). On cross-examination appellant's counsel delved into the interviews between Reyes and the special agents on October 1, 2, 4, and 5, 1948, and elicited information from Tillman that Reyes had discussed his personal history with the special agents but that it had not been incorporated in Reyes' signed statements, exhibits 52 and 54 (51 Tr. 5784). An account of Reyes' oral conversation about his personal history had been included in the Federal Bureau of Investigation investigative report. Tillman testified as to Reyes' oral statements without the aid of the Federal Bureau of Investigation report or any notes (51 Tr. 5796-5799). The report was produced in court by the prosecutor (51 Tr. 5786).

It is clear from the record that neither Tillman nor Dunn was using the Federal Bureau of Investigation reports or any notes to refresh his memory while testifying. Nor is there any suggestion or intimation that either witness had read any reports or notes in anticipation of his testimony or that the prosecutor had used them as an aid in questioning the witness. Appellant makes no such contention. It is settled law that it is only where the witness uses the paper to refresh his memory while testifying that the defendant may compel the production of the writing for inspection, *Kaufman v. United States*, 163 F. 2d 404, 409 (C.A. 6), cert. denied, 333 U. S. 857; *Lennon v. United States*, 20 F. 2d 490, 494 (C.A. 8); *United States v. Rosenfeld*, 57 F. 2d 74, 76 (C.A. 2), cert. denied, sub nom. *Nachman v. United States*, 286 U. S. 556; *Little v. United States*, 93 F. 2d 401, 407 (C.A.

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<sup>40</sup> The testimony is thus in accord with the prosecutor's assurance to the court that the Government had no notes but only the written case reports which had previously been referred to (51 Tr. 5793).

8), cert. denied, 303 U. S. 644; *National Labor Relations Board v. T. W. Phillips Gas and Oil Co.*, 141 F. 2d 304, 306 (C.A. 3); *C. W. Hull Co. v. Marquette Cement Mfg. Co.*, 208 Fed. 260, 265 (C.A. 8).

In *Mullaney v. United States*, 82 F. 2d 638, 643, this court upheld a refusal of the trial court to allow the appellant's counsel to inspect a memorandum made by a witness concerning the event about which he was testifying but which he did not use while on the witness stand.

*Goldman v. United States*, 316 U. S. 129, involved the almost identical situation which is now before this court. There the defense counsel sought, both at a preliminary hearing and at the trial, to obtain the right to inspect *notes* made by Federal Bureau of Investigation agents concerning events about which they gave evidence, although the agents did not use the notes while testifying.<sup>41</sup> The Supreme Court said (p. 132):

We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but are also a part of the Government's files a large discretion must be allowed the trial judge. We are unwilling to hold that the discretion was abused in this case.

Appellant, therefore, offers no valid reason why she should have been permitted to fish among confidential Government reports and files. The witnesses Dunn and Tillman, who had prepared the report, were present and on the witness stand. Both were able to answer all questions with reference to their oral conversations with Reyes about his personal history. Moreover, the subject matter was entirely collateral to the main issues in the case and to a certain extent was collateral to the issue of whether Reyes had

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<sup>41</sup> See *United States v. Goldman* 118 F. 2d 310, 314-315 (C.A. 2).



testified truthfully with respect to the circumstances under which he had executed exhibits 52 and 54.

The Federal Bureau of Investigation report was confidential, the production and disclosure of which was prohibited by regulation of the Attorney General,<sup>42</sup> and was a part of the work papers used by the prosecutor in preparing the case. It has been held that the Government is not required to turn over such papers to the opposite party, *Ex parte Sackett*, 74 F. 2d 922 (C.A. 9); *Boske v. Commingore*, 177 U. S. 459; *Hickman v. Taylor*, 329 U. S. 495. If, as the last of these cases holds, a party to a civil action is not entitled to such papers, there is no reason why a defendant in a criminal action should be so entitled, since in a criminal action there is no mutuality of discovery.

The cases cited by appellant relate to situations different from that here presented. In *Krulewitch v. United States*, 145 F. 2d 76 (C.A. 2), the court was dealing with a signed statement, given by the chief prosecuting witness to a Federal Bureau of Investigation agent, which completely exculpated the defendant and was directly contrary to the account of the events constituting the crime which the witness had related on the witness stand. *United States v. Andolscheck*, 142 F. 2d 503 (C.A. 2), cited by appellant, involved certain official reports made by the defendants in the regular course of government business which narrated defendants' conduct in dealing with certain "permittees." In *United States v. Beekman*, 155 F. 2d 580 (C.A. 2), also cited by appellant, the defendant was seeking official records of the Office of Price Administration showing that certain Government witnesses had been administratively found guilty of violating OPA regulations and had been penalized therefor.

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<sup>42</sup> Order No. 3229 dated May 2, 1939, issued pursuant to 5 U.S.C. § 22. See 11 Fed. Reg. 4920.

Thus, in each case, the documents in question were relevant and admissible as evidence. Here the report was not admissible as evidence, and the only purpose of appellant's request was to enable her to engage in a fishing exhibition.

## IX

### THE ARGUMENT OF THE PROSECUTORS WAS DIGNIFIED, TEMPERATE, AND UNPREJUDICIAL

The underlying theme of appellant's entire brief seems to be that the prosecutors were continually guilty of misconduct, and that the court itself, to say the least, was indulgent of such practices. This is but a continuation of the appellant's unsuccessful efforts in the trial court to "try the prosecution," an age-old practice which culminated in this case in the defense counsel's accusation in the closing argument that Government witnesses had perjured themselves (1 Arg. 155); that the United States had suppressed material evidence (1 Arg. 186); that special agents of the Federal Bureau of Investigation had lied (2 Arg. 240); and that the prosecution was "unfair, unjust and downright crooked" (1 Arg. 119). Most of appellant's insinuations have heretofore been answered by our previous argument. We are here concerned only with appellant's direct accusation of improper conduct.

After first stating that the prisoners of war were not on trial in this case, United States Attorney Hennessy remarked that some of the prisoners of war "may be put on trial" (1 Arg. 47). Appellant's counsel later protested, and the court immediately told the jury: "We are not concerned about anyone that may or may not be prosecuted. So you may disregard that for any purpose in this case" (1 Arg. 49). In the closing argument, the prosecutor stated that "this matter should serve as a warning to others that they cannot, in our great hour of peril, desert their country and with impunity, adhere to the enemy—and not, if the United

States survives, be brought to book before a Federal Court of justice" (2 Arg. 344-345). During his review of the evidence, the prosecutor omitted one sentence from Sugiyama's testimony (2 Arg. 231). The sentence read, "Let me cheer you up with some music." At the close of the Government's argument, the appellant directed the court's attention to these matters and in doing so supplied the missing sentence from Sugiyama's testimony (54 Tr. 5940). The court then told the jury that argument is not evidence, that the matter of evidence is entirely with the jury, that they heard the evidence, and that it was for them to take action on that evidence (54 Tr. 5941). This instruction was later repeated by the court in its charge to the jury, in which the jury was told: "You should distinguish carefully between what has been testified by the witnesses and what has been stated by the attorneys. Statements and arguments of counsel are not evidence in the case" (54 Tr. 5987). Shortly thereafter, the court told the jury what constituted evidence (54 Tr. 5988).

Thus, the possibility of any prejudice arising from these isolated remarks, even if they be considered in some degree unwarranted, was entirely removed by the action of the trial court when appellant's attorney directed attention to them. In addition to the instructions which the court gave to the jury at the time of appellant's protest and to similar ones which were given in the charge, the court told the jury at the outset of the final charge that they were to perform their duty without bias or prejudice, that the law does not permit jurors to be governed by sympathy, prejudice, or public opinion, and that they are expected to reach a verdict just, as to each side, regardless of what its consequences may be (54 Tr. 5943). Again at the end of the charge, the court told the jury, " \* \* \* the question before you can never be whether the government wins or loses the case. The government always wins when justice is done, regard-

less of whether the verdict be guilty or not guilty'' (54 Tr. 5991). Thus, even if the statements of Government counsel be considered as being unwarranted, they are cured by the court's admonitions to the jury. *Langford v. United States*, 178 F. 2d 48, 54 (C.A. 9), cert. denied, 339 U. S. 938; *Phelan v. United States*, 249 Fed. 43 (C.A. 9); *Diggs v. United States*, 220 Fed. 545, 555-556 (C.A. 9), affd., sub nom. *Caminetti v. United States*, 242 U. S. 470; *Carroll v. United States*, 154 Fed. 425 (C.A. 9). This is particularly true where, as here, appellant made no further request for other or different instruction on the point. *Borgia v. United States*, 78 F. 2d 550, 554 (C.A. 9), cert. denied, 296 U. S. 615.

The foregoing decisions of this circuit are in conformity with that of the Supreme Court, which held in *Holt v. United States*, 218 U. S. 245, that the conduct of a United States Attorney in characterizing certain alleged statements of the defendant as confessions, although they had been excluded, did not require a reversal of the conviction for homicide where the court had told the jury that they were to decide the case on the testimony of the witnesses and not on what counsel might say.

In the opening argument the United States Attorney commented on the defense contention that an agreement existed between the witnesses Ince, Cousens, and Reyes to sabotage the Zero Hour program. After commenting on the favorable living conditions of these prisoners at Tokyo hotels, the United States Attorney referred to Reyes' statements to the Federal Bureau of Investigation as "quite illuminating." At that time he told the jury that Government exhibit 52 was a very important piece of evidence, and that it proved conclusively that there was no sabotaging of the program (1 Arg. 35-36). Thereafter, he read exhibits 52 and 54 to the jury. In the closing argument, the prosecutor referred to exhibit 52 in connection with Major Cousens' belief in the Greater East Asia Co-Prosperity Sphere (2 Arg. 328).



Exhibits 52 and 54 were written pretrial statements which the defense witness Reyes had signed and delivered to agents of the Federal Bureau of Investigation and were in direct contradiction to much of Reyes' direct testimony. Exhibit 52 was offered as affecting the credibility of Reyes (33 Tr. 3779); exhibit 54 was admitted as a part and parcel of Reyes' cross-examination (33 Tr. 3825).

The statements in the United States Attorney's opening argument were proper, since if Reyes had lied as to the agreement between himself and Cousens and Ince, it would tend to destroy all testimony with respect to any such agreement. Considered in such a light the exhibit is illuminating, is very important, and the conclusion that it proves that there was no sabotage is an inference which the United States Attorney was entitled to draw from the evidence.

Reyes testified that everything he had told the special agents of the Federal Bureau of Investigation was true (32 Tr. 3688; 33 Tr. 3797) and that exhibit 52 was a true statement (33 Tr. 3746, 3749). He also confirmed the verity of many of the facts which were set forth in exhibits 52 and 54 (33 Tr. 3746, 3804-3807, 3811, 3816). Reyes thus not only admitted having made the previous statements contained in the exhibits but went further and confirmed the truth of a large part of the material contained therein. When this is coupled with his statements that he had told the truth to the Federal Bureau of Investigation agents, and that exhibit 52 was true, he in effect was testifying presently on the stand as to the truth of the matters related in the statement. These were not collateral matters but concerned the very issues in the case. Therefore, Reyes' testimony on cross-examination was more than evidence impeaching his direct testimony. It was affirmative proof.

Under these circumstances, the exhibits in question were a part of Reyes' cross-examination and could be considered evidence in the case, *Curtis v. United States*, 67 F. 2d 943,

946 (C.A. 10). As Judge Learned Hand said in *DiCarlo v. United States*, 6 F. 2d 364, 368 (C.A. 2), cert. denied, 268 U. S. 706:

If from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.

The above language was quoted with approval by this court in *Craig v. United States*, 81 F. 2d 816, 828, cert. denied, 298 U. S. 690.

Accordingly, the jury was entitled to gather the truth from the whole conduct and bearing of the witness Reyes, even in respect of contradictory statements he may have made at other times, *Kowalchuck v. United States*, 176 F. 2d 873 (C.A. 6).

*Bridges v. Wixon*, 326 U. S. 135, cited by appellant, deals with a different problem. In the situation there presented, the Government had introduced evidence of prior contradictory statements to impeach its own witness, by whom it was surprised.

Therefore, in its argument the Government was entitled to treat exhibits 52 and 54 as being an integral part of the evidence in the whole case.

The alleged erroneous argument of the prosecution mentioned at page 135 of appellant's brief (2 Arg. 329), should not be considered on appeal because, as appellant states (Br. p. 135), she did not object thereto. This court has very recently held that failure to interpose a timely objection to alleged improper argument constitutes a waiver of the right to urge the same on appeal, *Langford v. United States*, 178 F. 2d 48, 53 (C.A. 9), cert. denied, 339 U. S. 938.

But appellant insists that she made objection to the following argument and that it was prejudicial:

She unhesitatingly, unequivocally denies broadcasting those words or anything like it. Well you can understand why she refuses to admit the voicing of that broadcast. The Government has produced not two witnesses, but five who contradict her testimony. Mitsushio, George Mitsushio, Kenkichi Oki, Satoshi Nakamura, Clark Lee and Richard Henschel. (2 Arg. 303).

The appellant contends the foregoing argument is improper on the ground that it placed Clark Lee as a witness to overt act 6, when in reality he did not testify to that act. Overt act 6 dealt with broadcasts about the loss of ships. The appellant categorically denied that she had broadcast about the loss of ships at any time whatsoever (47 Tr. 5301). Clark Lee testified that the appellant had told him that she broadcast in substance as follows: "Orphans of the Pacific, you really are orphans now. How are you going to get home now that all of your ships are sunk?" (7 Tr. 485-486). Immediately after the argument quoted above, the Government quoted to the jury the verbatim testimony of Clark Lee on this point (2 Arg. 304). It will be observed that in its argument the Government was concerned with appellant's complete and unequivocal denial of the use at any time of any language whatsoever about the loss of ships. There is no doubt but that Clark Lee's testimony is contradictory of her absolute and complete denial about broadcasting the words in question, since it attributes to appellant an admission directly opposite to her trial testimony. It will be observed that the Government did not contend that Clark Lee was a witness to the commission of overt act 6 but only that his testimony was directly contradictory to appellant's testimony at the trial. It was quite proper for the Government to use the Lee testimony in this fashion.

It is difficult to perceive in what way the jury might have been misled. The testimony of Lee, which was read to the jury, specifically mentioned Formosa. The Government counsel told the jury that they were not bound by argument and that they were the sole judges of the facts and the credibility of the witnesses (2 Arg. 258, 259, 261, 262, 263, 284). The court instructed the jury that they were the judges of the facts, the credibility of the witnesses, and the weight to which their testimony is entitled (54 Tr. 5943, 5946, 5988). The jury was also charged that argument is not evidence and to consider the evidence only for those purposes for which it was admitted (54 Tr. 5941, 5990-5991). Direct and circumstantial evidence was defined in the court's charge (54 Tr. 5945), and the jury was told that direct evidence of two witnesses to the same overt act was required and they were particularly instructed that in this case direct evidence consisted of two eyewitnesses who saw and heard the act done—saw the movement and heard the sound, if any, comprising the act (54 Tr. 5967).

In addition, the court charged the jury that the witnesses who testified concerning the commission of overt act 6 were George Mitsushio, Kenkichi Oki, and Satoshi Nakamura (54 Tr. 5955) and that the credibility of these witnesses was a matter for their determination (54 Tr. 5952). In its argument to the jury, the Government also stated that the law required the direct testimony of two witnesses to the same overt act before such an act could be found proved (2 Arg. 283).

Accordingly, the Government's argument here was not only proper, it could not have conceivably confused or misled the jury as to who were the witnesses who gave direct evidence about the commission of overt act 6.

Ordinarily it is within the discretion of the trial court to determine whether or not the limits of professional propriety have been exceeded, and the exercise of that discre-



tion will not be reviewed in an appellate court unless the invective is so improper that it may be seen to be clearly injurious, *Johnston v. United States*, 154 Fed. 445, 449 (C.A. 9). In order to entitle an accused to a reversal it must appear that the argument objected to was plainly unwarranted and so improper as to be clearly injurious, *Chadwick v. United States* 141 Fed. 225, 245 (C.A. 6); Cf. *Dimmick v. United States*, 135 Fed. 257, 270 (C.A. 9), cert. denied, 189 U. S. 509.

The prosecutors did not dwell at great length on any of the foregoing matters. They are minor instances in a six-hour argument at the conclusion of a three-month trial (52 Tr. 5926). The argument of the Government should be viewed in its entirety to ascertain whether it was so prejudicial as to require a reversal. A careful reading of the entire argument on behalf of the Government will disclose that it was dignified, temperate, and fair. There are many instances where the prosecutor leaned over backwards to protect and safeguard appellant's rights. Thus, the jury was told by the prosecutor that counsel's arguments were not binding on them (2 Arg. 258), that the burden was on the Government to prove appellant's guilt beyond a reasonable doubt (2 Arg. 262), that she was presumed to be innocent (2 Arg. 263), and that the Government desired a fair and impartial trial for appellant and not the conviction of an innocent person (2 Arg. 258-264). When this is contrasted with the intemperate and unfounded attack by the appellant's counsel upon the integrity and honor of the prosecutors, it is apparent that no prejudice could have resulted from the isolated remarks set forth above.

Here, as in *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 242, the comments of appellant's counsel were but casual episodes in a lengthy summation, and not at all reflective of the type of the Government's argument as a whole. There is no such gross and persistent misconduct as per-

meates the entire argument in *Berger v. United States*, 295 U. S. 78. *Taliaferro v. United States*, 47 F. 2d 699, and *Turk v. United States*, 20 F. 2d 129, upon which appellant relies (Br. pp. 197, 199) are concerned with situations different from those here presented. In the *Taliaferro* case the prosecutor went completely outside the record and made statements of facts which were within his own personal knowledge. In the *Turk* case the prosecutor dwelt at length on the unsavory conditions in the community and also related facts known to him which were not in evidence. This is not the case here and appellant makes no such contention. In *Minker v. United States*, 85 F. 2d 425 (C.A. 3), cited by appellant (Br. p. 135), the court found the entire argument to be permeated with the personal views of the prosecutor and insinuations as to his personal knowledge of circumstances surrounding the case. *Beck v. United States*, 33 F. 2d 107, 114 (C.A. 8), was a case of persistent misconduct after rebuke by the trial court, a factor not present here. As to the omission of the sentence from Sugiyama's testimony, it should be apparent that counsel was not expected to quote the evidence verbatim, especially in a three-month trial.

As the Supreme Court has pointed out, if every remark of counsel outside the record were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy and the excitement of trial, even the most experienced counselors are carried away, *Dunlop v. United States*, 165 U. S. 486, 498; *Crumpton v. United States*, 138 U. S. 361, 364.

## X

### INSTRUCTIONS

#### A. Instructions Given

The illustration given to the jury in connection with the instruction as to the difference between motive and intent (54 Tr. 5975) was not argumentative. The facts set out

were far removed from the evidence in the case and the situation portrayed was different from that of appellant. Its object was merely to clarify for the jury the difference between intent and motive. Illustrations are not objectionable merely because they bear hardly upon the defendant or only because the transaction with which the defendant is charged is one of like character and indicative of the same intent, *Allis v. United States*, 155 U. S. 117; *Luteraan v. United States*, 93 F. 2d 395, 401 (C.A. 8), cert. denied, 303 U. S. 644.

The instruction—that appellant could not avoid the consequences of her act, if the jury found that she voluntarily performed acts which she knew would give aid and comfort to the enemy of the United States and by so doing intended to assist the enemy or injure the United States and betray her own country, by asserting her motive was not to aid the enemy, or that her motive was a desire for financial gain or to provide herself with means of a livelihood—was one which properly took cognizance of certain of appellant's evidence. Appellant had introduced evidence that she had difficulty obtaining employment; that she had gotten into debt and wanted another job to help pay her obligations; that the Zero Hour was an entertainment program and that she had been so informed (45 Tr. 4968, 4969, 4983, 4984, 4985, 4988, 4999, 5019; 46 Tr. 5104; 47 Tr. 5307-5308). The Government's evidence also touched upon appellant's motives with respect to her employment at the radio station (7 Tr. 487, 488; 9 Tr. 665; 14 Tr. 1405; 40 Tr. 4531; 48 Tr. 5361). These matters were touched upon in her opening statement, and the closing argument stressed the idea that the Zero Hour was only entertainment (28 Tr. 3079, 3080, 3084-3085; 1 Arg. 121-125, 140, 143, 151, 160, 170, 205, 225-226; 2 Arg. 237, 257).

Thus, contrary to appellant's argument (Br. pp. 188-189), the instruction deals with matters which appellant deemed

important as tending to exculpate her and served not to confuse, but to clarify, the issue to be decided by the jury. Almost identical instructions were upheld in *Chandler v. United States*, 171 F. 2d 921, 943 (C.A. 1), cert. denied, 336 U. S. 918, and *Best v. United States*, 184 F. 2d 131, 137 (C.A. 1).

In referring to the issue of citizenship, the court informed the jury that there was evidence that the appellant was born in the United States on July 4, 1916, and that in 1941 and 1947 she executed applications for passports in which she stated under oath that she was born in the United States and was a native-born American. These facts were undisputed at the trial (44 Tr. 4909, 4922; 47 Tr. 5216; 50 Tr. 5550-5552). Moreover, appellant testified that she claimed United States citizenship as late as August 1947 (50 Tr. 5554) and that she still wished to be a citizen of the United States (50 Tr. 5554). The court, therefore, was not singling out the Government's evidence to the exclusion of that of the appellant. It was only referring to evidence upon which both sides were in agreement and therefore was not unfair to appellant.

That part of the instruction which charged the jury that it was not necessary that the acts done or the aid given be successful or that the Japanese propaganda achieve the desired result was a correct statement of the law. It is immaterial that the enemy mission which appellant assisted did not achieve its purpose, *Chandler v. United States*, 171 F. 2d 921, 941 (C.A. 1), cert. denied, 336 U. S. 918; *Haupt v. United States*, 330 U. S. 631. The law with respect to this point has been fully discussed, *supra* pages 96-98.

Appellant urges (Br. pp. 132-134) that the court erred in informing the jury that "The witnesses who testified regarding the commission of overt act 6 were George Mitsushio, Kenkichi Oki, and Satoshi Nakamura" (54 Tr. 5955). Her argument is that by the above statement the court with-



drew from the jury the function of deciding whether the witnesses, and particularly the witness Nakamura, were all testifying to the same overt act.

In confining her argument to the one sentence set out above, appellant avoids the intendment of the charge as a whole and particularly that part which relates to the evidence necessary to prove the commission of an overt act. The sentence did not stand alone but was to be taken with what preceded it and also with what followed it, *Boyd v. United States*, 271 U. S. 104, 107. When the entire instruction relative to the proof of overt acts is examined, it is clear that the court did not in any way impinge upon the jury's prerogative of determining whether there was credible direct evidence from two witnesses to each overt act.

Before reading the overt acts charged in the indictment and naming the witnesses who had testified regarding each act, the court informed the jury that it would read the names of the witnesses who had so testified and then instructed the jury that:

The credibility of the witnesses to the overt acts is for you to determine. It is for you to say whether or not you believe these witnesses and to what extent in determining whether any overt act has been proved beyond a reasonable doubt by the direct testimony of two witnesses that the defendant committed the act. [54 Tr. 5952-5953.]

The court later informed the jury of the constitutional requirement that no person shall be convicted of treason unless upon the testimony of two witnesses to the same overt act and told them that, with respect to each overt act charged, the burden was upon the prosecution to produce at least two witnesses to the whole of the same overt act (54 Tr. 5966). Immediately thereafter, the jury was told that the two witnesses must be witnesses whose testimony gives direct evidence of the act; that direct evidence gives

eyewitness account of a fact; and that persons testifying to admissions, if any, claimed to have been made out of court, and other persons not giving eyewitness testimony as to one or more of the overt acts, could not be counted as witnesses in determining whether the constitutional requirement had been met (54 Tr. 5966-5967).

The court then impressed upon the jury that the minimum proof necessary was direct evidence of the overt act given through the testimony of at least two witnesses, and that the jury must be convinced beyond a reasonable doubt of the truth of such testimony. The jury was then charged that:

Direct evidence of any overt act charged in this case would necessarily consist of the testimony of eyewitnesses who saw and heard the act done—saw the movement and heard the sound, if any, comprising the act. So the constitutional requirement is met only when, after considering the testimony given by all witnesses who testified as to an alleged overt act, the jury finds that the whole of such overt act—each movement and sound, if any, comprising the alleged act—is established as charged in the indictment by the testimony of at least two witnesses. [54 Tr. 5967-5968.]

Near the end of its charge, the court told the jury:

Whether or not the whole of an alleged overt act submitted to the jury for consideration has been proved by the direct testimony of at least two witnesses; and if so proved to have been committed by the defendant, whether or not the overt act was committed by the defendant knowingly, intentionally, wilfully, unlawfully, feloniously, traitorously and treasonably as charged in the indictment; and whether or not the overt act, if so committed, actually gave aid and comfort to the enemy—are all questions of fact, which it is the exclusive province of the jury to determine from all the evidence in the case. [54 Tr. 5988-5989.]

When the entire charge is construed, it is obvious that the jurors clearly understood that it was for them to decide whether there was credible direct evidence from two witnesses as to the commission of the same overt act.

### B. Instructions Refused

Requested instruction No. 30A (1 R. 292) was correctly refused for several reasons. Certain of appellant's admissions relative to her United States citizenship were made prior to the commission of the offense for which she was convicted.<sup>43</sup> Such admissions need not be corroborated, *Warszower v. United States*, 312 U. S. 342, 345-347; *United States v. Potson*, 171 F. 2d 495, 499 (C.A. 7). In this respect alone the request was improper, since it did not distinguish between the admissions made before the commission of the offense and those made subsequently.

Moreover, in this circuit the rule is well settled that it is unnecessary to make full proof of the *corpus delicti* independently of the defendant's confessions, *Wynkoop v. United States*, 22 F. 2d 799; *Wiggins v. United States*, 64 F. 2d 950, cert. denied, 290 U. S. 657. *Pearlman v. United States*, 10 F. d 460, cited by appellant (Br. p. 191), makes this clear. The rule in this circuit as announced in the foregoing cases is that the corroborative evidence need not independently establish the *corpus delicti* beyond a reasonable doubt. It is sufficient if the corroborative evidence, when considered in connection with the confession or admission, satisfies the jury beyond a reasonable doubt that the offense was in fact committed. Other courts of appeal have so held, *Ercoli v. United States*, 131 F. d 354 (App. D. C.); *United States v. Kertess*, 139 F. 2d 923 (C.A. 2,) cert. denied, 321 U. S. 795; *Jordan v. United States*, 60 F. 2d 4 (C.A. 4), cert.

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<sup>43</sup> See exhibit 4, "Application for Passport" dated September 8, 1941; exhibit 6, "Affidavit of Registration" dated July 17, 1940; and exhibit 7, "Application for Evacuation" dated March 30 and September 2, 1942.

denied, 287 U. S. 633. The rule is one of sufficiency of the evidence.

Where, as here, there was an abundance of evidence in addition to the appellant's admission, there was no basis for the instruction requested. Appellant cites no cases holding that she was entitled to the instruction requested. *Pearlman v. United States, supra*, and *Goff v. United States*, 257 Fed. 294, do not deal with instructions but only with the rule as respects the sufficiency of the evidence. Indeed, the *Pearlman* case indicates that the matter was adequately covered by the usual instruction on presumption of innocence and reasonable doubt. Such instructions were given by the court in this case (54 Tr. 5943-5946). The court also told the jury that:

The written statement of the defendant, made to an agent of the Federal Bureau of Investigation is not a "confession in open court" . . . upon which standing alone, the defendant might be convicted. [54 Tr. 5946.]

\* \* \* \* \*

All testimony as to any oral statements or admissions alleged to have been made by a defendant outside of court should be considered with caution and weighed with care. [54 Tr. 5948.]

The only cases dealing with requested instructions on this matter have held that the requests in question were properly refused, *Daeche v. United States*, 250 Fed. 566 (C.A. 2); *George v. United States*, 125 F. 2d 559, 563 (App. D. C.); *Murray v. United States*, 288 Fed. 1008 (App. D. C.), cert. denied, 262 U. S. 757. Here, as in *George v. United States, supra*, the proposed instruction was not a sufficient statement of the law, since it failed to inform the jury that the corroborative evidence need not itself be sufficient independently to prove the issues involved.

Requested instruction 84 (1 R. 296) amounts to a comment on the specific piece of evidence to which it relates.



Moreover, the court told the jury that appellant "could have renounced and abandoned her citizenship, together with its privileges and obligations at any time" (54 Tr. 5961). The jury was instructed that:

... evidence as to acts or happenings or events not charged in the indictment, which has been received for the sole and limited purpose of aiding the jury to determine the defendant's state of mind or intent during the period specified in the indictment, may be considered along with all other evidence in the case in determining whether or not the defendant did "adhere to the enemies of the United States, and more particularly, to wit, the Imperial Japanese Government," as charged in the indictment. [54 Tr. 5964.]

Appellant was not entitled to an instruction singling out her evidence on the issue of intent particularly since the matter was covered by the general instruction set out above, *Klein v. United States*, 176 F. 2d 184 (C.A. 8), cert. denied, 338 U. S. 870; *Bird v. United States*, 187 U. S. 118, 130-131; *Wiederman v. United States*, 10 F. 2d 745, 746 (C.A. 8); *Lewis v. United States*, 295 Fed. 441, 447 (C.A. 1), cert. denied, 265 U. S. 594.

Appellant argues that she was prejudiced by the failure of the trial court to give her requested instruction No. 88 (Br. p. 192). The first sentence of the requested instruction reads:

Various alleged statements by the defendant as well as records of voice tests have been admitted into evidence for your consideration.

The requested instruction then states that before dealing with these from any other standpoint the jury must find that appellant made them voluntarily, and that if the jury does not find that the Government has shown the statement to be voluntary they must discard it from their consideration.

The requested instruction was improper in that its scope was too broad. By its terms it would apply to every oral or written statement attributed to the appellant by any witness, regardless of whether appellant had or had not raised the issue of voluntariness. There were many statements attributed to appellant by the witnesses from Radio Tokyo and by the witnesses who heard her over the radio.

Appellant now seeks to refine the instruction into one concerning the voluntariness of confessions (Br. p. 193). But, as we have previously pointed out, *supra*, pages 55-56, she never made any confession. In her brief she does not point out to what statement or admission such an instruction should have been applicable. Nor did she do so at the trial. She was content with an objection on the ground that the refused instruction "states the correct law or is applicable to the evidence and not covered by other instructions" (53 Tr. 5934). Number 88 was but one of approximately 120 requested instructions which appellant listed under this objection (53 Tr. 5934-5935). She did not point out to the court wherein she had raised the issue of or controverted the voluntary character of any particular admission or statement attributed to her and request an appropriate instruction with reference to such admission or statement. Certainly Rule 30, Federal Rules of Criminal Procedure, contemplates that a party in a criminal case must state "distinctly the matter to which he objects and the grounds of objection." The reason for the rule is to enable the trial court to correct any mistakes by his instructions, and the failure of appellant to point out the necessity of and the factual basis for the instruction for which she now contends falls within the fair meaning of the rule. Cf. *Schuermann v. United States*, 174 F. 2d 397 (C.A. 8), cert. denied, 338 U. S. 831; *United States v. Wilson*, 154 F. 2d 802, 804 (C.A. 2), remanded, 328 U. S. 823. If there was any issue as to whether any statement attributed to appellant

was involuntary, it was her duty under Rule 30 to point out as to what exhibit or testimony it existed and request appropriate instructions on the point.

Furthermore, as we pointed out, *supra*, page 56, appellant did not specifically raise the question as to the voluntary character of her statements or admissions at the time they were offered in evidence or at any other time, hence there was no reason for the court to give such an instruction on its own initiative.

Moreover, as pointed out, *supra*, pages 45-48, 57-61, the evidence upon which appellant apparently relies to establish the necessity for the instruction which she contends should have been given, is insufficient to warrant a submission of the question to the jury. Where there is no evidence from which a jury could find that a statement or admission was involuntary, there is no need for an instruction covering the matter, *Stillman v. United States*, 177 F. 2d 607, 619 (C.A. 9); *Lewis v. United States*, 74 F. 2d 173, 178 (C.A. 9); *Raarup v. United States*, 23 F. 2d 547, 548 (C.A. 5), cert. denied, 277 U. S. 576.

Requested instructions numbered 161-169 (1 R. 318-320) would have informed the jury that the appellant must be acquitted if they found she was denied a speedy trial or if they had a reasonable doubt that she had been accorded a speedy trial. Such instructions were clearly erroneous statements of the law, and the court was correct in refusing them. This matter has been discussed, *supra*, pages 31-33. The offense of which appellant was convicted is not one which is covered by the statute of limitations, and laches is no defense.

Requested instruction numbered 60 (1 R. 295) was a statement as to the effect of the evidence. The court quite properly left it to the jury to determine whether any overt act actually gave aid and comfort to the enemy, and cautioned them that it was not suggesting or intimating, by submitting

an overt act for their consideration, that any overt act actually gave aid and comfort to Japan in its war against the United States (54 Tr. 5988-5989).

### C. Summary

A careful reading of the entire charge will suffice to show that the jury was properly and adequately instructed as to the issues involved and the law governing the case. Under these circumstances, there is no ground for reversal, *Stein v. United States*, 166 F. 2d 851, 855 (C.A. 9), cert. denied, 334 U. S. 844; *Taylor v. United States*, 142 F. 2d 808, 817 (C.A. 9), cert. denied, 323 U. S. 723.

### CONCLUSION

For the reasons heretofore set forth it is respectfully submitted that the judgment of the District Court should be affirmed.

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January, 1951



## APPENDIX A

## UNITED STATES CODE, TITLE 10

## § 15. Use of Army as posse comitatus.

It shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding \$10,000 or imprisonment not exceeding two years or by both such fine and imprisonment. *Provided*, This section shall not be construed to apply to the District of Alaska. (June 18, 1878, ch. 263, § 15, 20 Stat. 152; Mar. 3, 1899, ch. 429, § 363, 30 Stat. 1325; June 6, 1900, ch. 786, § 29, 31 Stat. 330.)

## APPENDIX B

13 Department of State Bulletin, p. 480, September 30, 1945

AUTHORITY OF GENERAL MACARTHUR AS SUPREME  
COMMANDER OF THE ALLIED POWERS

The text of a message transmitted on September 6 through the Joint Chiefs of Staff to General MacArthur follows. It was prepared jointly by the Department of State, the War Department, and the Navy Department and approved by the President on September 6. The message is a statement clarifying the authority which General MacArthur is to exercise in his position as Supreme Commander for the Allied powers.

1. The authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Commander for the Allied powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender. Since your authority is supreme, you will not entertain any question on the part of the Japanese as to its scope.

2. Control of Japan shall be exercised through the Japanese Government to the extent that such an arrangement produces satisfactory results. This does not prejudice your right to act directly if required. You may enforce the orders issued by you by the employment of such measures as you deem necessary, including the use of force.

3. The statement of intentions contained in the Potsdam Declaration will be given full effect. It will not be given effect, however, because we consider ourselves bound in a contractual relationship with Japan as a result of that document. It will be respected and given effect because the Potsdam Declaration<sup>1</sup> forms a part

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<sup>1</sup> The Proclamation Defining Terms for Japanese Surrender appears in the Bulletin of July 29, 1945, p. 137. The message from the Japanese Government to the Government of the United States referred to this proclamation as follows: "The Japanese Government are ready to accept the terms enumerated in the joint declaration which was issued at Potsdam on July 26th, 1945, by the heads of the Governments of the United States, Great Britain, and China, and

of our policy with relation to peace and security in the Far East.

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later subscribed by the Soviet Government, with the understanding that the said *declaration* does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler." See BULLETIN of Aug. 12, 1945, p. 205.

This proclamation was issued while the Tripartite Conference of Berlin was in progress at the Cecilienhof near Potsdam. See BULLETIN of Aug. 5, 1945, p. 153.

The Instrument of Surrender, in which Japan accepted the "provisions set forth in the *declaration* issued by the heads of the Governments of the United States, China and Great Britain on 26 July 1945, at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics . . ." appears on pages 346-65 of the BULLETIN of Sept. 9, 1945.

## APPENDIX C

The following cross-reference to the points set forth in appellant's brief is submitted for the convenience of the Court. It should be noted, however, that due to the difference in organization and legal approach to the issues presented and the complex nature of this appeal, it is not possible to make such cross-reference accurate in all respects, since certain of the points involved do not lend themselves readily to cross-reference.

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No. 12,383

IN THE

United States Court of Appeals  
For the Ninth Circuit

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IVA IKUKO TOGURI d'AQUINO,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

APPELLANT'S REPLY BRIEF.

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IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

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Iva Ikuko Toguri d'Aquino,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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**APPELLANT'S REPLY BRIEF.**

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Our opening brief omitted to give transcript references showing where we objected to the admission of the various confessions of the defendant. They are as follows:

*Exhibit 24* (appellant's opening br. p. 138)—original objection, XIV-1453:5-7, 12-16; 1457:13-19; motion to strike after cross-examination of Tillman, XVI-1612:15-1613:7;

*Exhibit 15* (appellant's opening br. p. 141ff)—original objection VIII-614:18-20, 615:1-3, 11-13 (lines 11-13 are particularly directed to the document as a confession);

*Exhibit 2* (appellant's opening brief p. 147ff)—original objection, I-37:12-16; statement of grounds of objection during cross-examination of Eisenhart, I-42:18-25; motion to strike after Eisenhart's cross-examination, I-57:1-4; II-97:7-13;

*Kramer* (appellant's opening br. p. 148ff) original objection, XIII-1358:12-17: 1361:21-3, 1362:9-10, 1363:10-12, 1365:7-9, 1366:4-6;

*Keeney* (appellant's opening brief, p. 150ff) original objection, XIV-1402:25-1403:4, 1404:22-4, 1405:10-13, 21-4, 1406:19-21;

*Page* (appellant's opening brief p. 151ff)—original objection, XIV-1423:13-16, 1423:24-1428:4, 1424:12, 1425:11-14, 1425:23-1426:1, 1426:10-14;

*Fenimore* (appellant's opening brief p. 152)—original objection, XIV-1434:1-3, 22-5, 1435:14-18, 1436:2-4, 10-14, 1437:3-8, 18-24.

\* \* \* \* \*

Appellee has taken 4 months and 142 pages to answer an appeal which, on the motion for bail, it asserted raised "no substantial question" (see page 2 of Government's Brief filed in this Court in opposition to bail; see also *d'Aquino v. U. S.*, 180 F.2d 271, 272, where Justice Douglas goes out of his way to say the appeal is *not* frivolous). Apparently the appellee makes any argument which promises to keep the appellant in jail for the time being, without regard to the facts, the law or the justice of the case.

We shall first point out the arguments in appellant's opening brief which appellee leaves unanswered; then we shall answer appellee's contentions in substantially the order in which they are presented.

# **I. PARTS OF APPELLANT'S BRIEF NOT ANSWERED BY APPELLEE.**

## **A. EXHIBITS 16-21, 22, 23, 44, 74, R.**

Appellants sometimes try to disregard the appellee's evidence on appeal. *It is much rarer that an appellee insists on disregarding his own evidence.* Yet in its 29-page statement of "facts" (Appellee's Br. pp. 1-29) appellee *never once mentions the contents of the scripts and recordings of defendant's program, most of which the government introduced on its case in chief.* (Exhibits 16-21, are mentioned at page 20 as means of identifying defendant's voice; at page 25 appellee admits the existence of Exhibits 22, 23, 44, and 74.)

These constitute the most reliable evidence of the contents of defendant's broadcasts. Appellee ignores them entirely and bases its "facts" solely on the unaided "recollection" of witnesses. (Appellee's Br. pp. 18-25.) *Appellee does not deny* that the contents of these exhibits were innocent; *nor does it deny* that they flatly contradict the testimony of witnesses recounting alleged "recollections".

Nevertheless, counsel have the effrontery to argue that the prosecution made out a "strong case". (Appellee's brief p. 88.) Likewise appellee *does not deny* that since the government destroyed its own recordings in Hawaii (appellant's opening brief p. 22; appellee's brief p. 35), *appellee attempted to perpetrate a fraud* on the Court and jury by seeking to create the impression that the only records of appellant's broadcasts not produced in Court were those which had been destroyed by the Japanese. (Appellant's opening brief p. 22.)



## B. OTHER ARGUMENTS NOT ANSWERED.

### 1. EXCLUSION OF EVIDENCE OF RUTH HAYAKAWA.

Appellee does not contest the point that it was error to exclude Ruth Hayakawa's testimony as to the terror exercised over the *entire staff* at Radio Tokyo. (Appellant's opening brief point II-A-3-c, p. 91.) At page 74 of its brief, appellee mentions the point, but makes no attempt to answer it.

### 2. EXCLUSION OF OKADA'S TESTIMONY ABOUT THE ORGANIZATION AND ACTIVITIES OF THE KEMPEI-TAI.

Appellee does not answer the point that the Court should have admitted Okada's testimony as to the organization and activities of the Kempei-tai. These were relevant, among other things, on the issue of appellant's ability to leave her job or escape. (Appellant's opening brief p. 94.)

### 3. EXCLUSION OF DEFENSE EVIDENCE AS TO COST OF FOOD AT DAI ICHI HOTEL.

Appellee does not answer the argument that since the Court had admitted government's *Exhibits 45* and *46* dealing with the price of meals at the Dai Ichi Hotel, it was error to exclude evidence on the same subject on behalf of defendant. (Appellant's opening brief p. 96.)

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## II. MISSTATEMENTS OF FACT IN APPELLEE'S BRIEF.

The appellee's brief contains numerous misstatements of fact, some quite serious. At page 90 counsel claim that one of their misstatements *at the trial* was an "inadvertence": doubtless the same contention will be made gen-

erally. These “inadvertences” can be summarized in the language of a boast attributed to Wilson Mizner during his gambling-hall days—that he “*never made a mistake that was not in favor of the house*”. Counsel were able to correct a typographical error in the transcript (“care” for “dare” at VIII-611:25; see appellee’s brief p. 47 n20)—which shows their intimate knowledge of the evidence. The page references in this section will be to appellee’s brief and all italics added unless otherwise indicated.

A. At page 6 it is said:

“After the outbreak of the war, appellant was visited by the Japanese police who on various occasions suggested that she obtain Japanese citizenship. (44 Tr. 4933-4934.)”

The cited passage contains the following: XLIV-4932:24-4933:3.

“Q. What did he state on these occasions?

A. He said that——

Q. In substance?

A. If you didn’t take out Japanese citizen (sic) they would make it *very, very inconvenient for you—for me \* \* \**”

XLIV-4934:2-5:

“A. Yes, in substance; yes, sir. Always told me directly, ‘you change your United States citizenship, and become a Japanese, *or you will be, just to continue hounding you*, and we will submit (sic) you into a Japanese citizenship.’”

The foregoing apparently is the government’s idea of “suggestion”. If so, it may explain some other features in the case—particularly the contention that government

counsel did not bully defense witnesses. (Appellee's brief p. 87.) Perhaps counsel were only "suggesting" to the witnesses!

B. At page 8 it is said——

"In the *fall* of 1943, appellant went to work for the Broadcasting Corporation of Japan as a typist at a salary of 100 yen a month. (Ex. 13.)"

*Exhibit 13* shows that appellant began working as a typist for the Broadcasting Corporation of Japan on *August 23—in the summer*. (Fall begins September 23.) The probable purpose of this misstatement can be seen from the paragraph on page 9 which begins——

"In the fall of 1943 appellant embarked upon her broadcasting career for the Broadcasting Corporation of Japan. (10 Tr. 907.)"

The reference—(10 Tr. 907) says defendant started broadcasting in *November*. By mentioning only the season and not the month, and misstating the season of the first date (August 23) appellee gives the impression that the typing job and the broadcasting jobs began almost simultaneously. Of course, that is not true.

C. At page 9 we find——

"At the conclusion of her job she was *receiving* the sum of 180 yen a month. (Ex. 13.) \* \* \*".

Appellant never *received* 180 yen a month, since there was a tax deduction of around 20%. (*Yamazaki*, XXV-2797:19-2798:19.)

D. On page 14 it is said:

"Appellant admitted that no physical force, compulsion, duress, coercion, pressure or threat thereof

was exerted upon her by the Japanese or anyone else to compel her to take the broadcasting position at Radio Tokyo or to continue in that job (47 Tr. 5289-5290; 48 Tr. 5332-5337; 49 Tr. 5502-5504; Ex. 24)''.

A reading of the very passages which are cited will show that appellant admitted only that no physical force was applied to her.

E. On page 15 appellee says:

“Norman Reyes \* \* \* had previously given statements to the Federal Bureau of Investigation Agents \* \* \* that the only agreement between Ince, Cousens and himself was the one to plead duress after the war so that nothing would happen to them. He *affirmed the truth of the above statements* on cross-examination (33 Tr. 3745-3746, 3785-3787)''.

The essential parts of the testimony at XXXIII-3785-7 are quoted in the appendix,

XXXIII-3785:7-13, XXXIII-3786:1-3, XXXIII-3786:9-3787:24.

(See appendix, p. i.)

The last question and answer of this passage quoted in the appendix read,

“Q. And of course, that statement that you made to them *was true, wasn't it*, Norman? This statement I am just asking you about that you said you made *was true, wasn't it?*

A. *No, it was not.*”

Government counsel seem to have a hard time distinguishing between affirmance and denial. Perhaps another “inadvertence”.



F. Also on page 15 it is said,

“In the spring of 1945 she was again absent for a period in excess of one month, and she ignored a card requesting her to return to work (44 Tr. 4858-4859)”.

This omits to say that, as a result of her ignoring the card, an officer came to her house to fetch her. (See Appellant's Opening Br. p. 86.)

G. At page 20 appellee says:

“Exhibits 16-21 were recordings of certain Zero Hour programs which had been monitored by the Federal Communications Commission at Portland, Oregon, *for a short time*”.

The “short time” was almost exactly a year—more than half the time that defendant was broadcasting. (See *Exhibit 25*, showing the earliest recording to have been taken on August 16, 1944, the last on August 11, 1945.)

H. On page 22 (especially footnote 11) appellee says that Henschel's testimony corroborated the testimony of eyewitnesses to alleged overt Act 6. On the contrary the eyewitnesses to the alleged overt Act 6 placed it between 6 and 7 P.M. Tokyo time, while Henschel claims that he heard a broadcast long after dark—probably between 9 P.M. and 11 P.M. Philippine time which is 10-12 P.M. Tokyo time. (See *Mitsushio*, XI-975:10—shortly after 6 P.M.; appellant's opening brief pp. 27-28, Zero hour from 6-7 P.M.; also *Nakamura*, XXI-2296:16; “between 6 and 7:00 P.M.”; see appellant's opening brief, App. 5-6, Henschel said long after dark, 9-11 P.M. Philippine time.) (The original reference at the foot of page 24 of Appellant's Opening Brief should be to IX-682:16-18, not 672.) It is true, appellee says (Br. p. 101) that *another*

witness said "time was not a main factor to them then"—but that does not change the fact that Henschel's testimony was *not corroborative* of the Japanese witnesses on Overt Act 6.

I. At page 29 appellee includes Robert Cowan's testimony under the heading "The Overt Acts" though he is evidently talking about a different broadcast.

J. On pages 34-5 it is said:

"The missing scripts were not shown to have been a part of the Government files; in fact the testimony of Cowan indicates the contrary, i.e., that they were kept by the soldiers *to whom they were given as personal mementos*, of their wartime experiences".

*Exhibit 44* was alone given as a souvenir (Cowan, XXVI-2822:9-13) and was produced in Court. *The other scripts mentioned by this witness were taken from the defendant in connection with the making of the Army informational film.* (See appendix, p. iii.)

These passages quoted in the appendix show that most of the scripts obtained by Cowan and Kaduson were obtained on official Army business, not as souvenirs.

K. On page 58, note 29 we are told,

"However, Hogan testified that Brundidge did not make such a statement in his presence, but that he did not know what Brundidge had said out of his presence, or whether in fact anything was said (8 Tr. 634)".

Hogan said that Brundidge talked to defendant out of his *hearing* but *in his presence*, i.e., in the same room.

See Hogan VIII-634:15-20, quoted appendix, p. iv.

L. On page 95, in discussing the evidence which we offered to show that appellant's broadcasts were beneficial or at least harmless to American morale, appellee says:

"However, at the trial, appellant did not advance that reason for justifying the admission of the evidence offered (40 Tr. 4560-4561; 39 Tr. 4348; 40 Tr. 4455-4456; 50 Tr. 5596-5599).

Regardless of how appellant twists the reason for offering this type of evidence \* \* \*"

On the contrary, at XL-456:18-20 defendant expressly offered to prove that the Alaskan army bulletin stated in effect,

"That the Orphan Ann or Tokyo Rose Zero hour Radio program from Radio Toyko is the strongest factor in building U. S. morale for our troops in the Alaskan chain".

M. On page 105, note 37, appellee goes outside the record to speculate what took place between defense counsel and Brundidge which enabled us to offer Brundidge's passport in evidence (Def. Ex. BR for identification). So we shall have to go outside the record to state the facts.

Brundidge was a gentleman who tried to switch sides. He first went to Japan with Hogan at Government expense (Appellant's Op. Br. p. 207). Yagi, a witness before the grand jury, confessed to Tillman that Brundidge had bribed and suborned him (*Tillman*, XVI-1597:17-1599:13). When the prosecutors finally decided that Brundidge was too malodorous to use as a witness, he tried to take revenge on his former associates by offering himself as a witness for the defendant. Obviously we

would not vouch for the veracity of a character like that. His passport, being a government document, was in a different category. *It is this unsavory individual who instigated the reopening of the prosecution and with whom the government worked hand-in-glove gathering "evidence"!*

N. On page 113 is the following sentence:

“Appellant contends (Br. p. 219) that the trial court erroneously refused to permit her on cross-examination to ask Government witness Lee if he had not written a book in which he stated that appellant’s broadcasts *were entertaining*”.

The question, and the passage in Lee’s book said “*entertaining to our troops*”. Appellee leaves off the words “to our troops”—presumably another “inadvertence”.

---

### III. UNCONSTITUTIONALITY OF TREASON PROSECUTION IN VIEW OF WARTIME NATURALIZATION TO ENEMY BELLIGERENT. (Appellee’s Br. pp. 29-31.)

In its heading on page 29, appellee refers only to the Nationality Act of 1940. Our arguments were based not only on the original act but also on 8 USC 801 (i) which was added in 1944. (See Appellant’s Opening Br., pp. 46-7.)

Appellee’s argument turns entirely on the *assumption* that there is a “*legitimate*” classification in allowing American citizens to become “naturalized” to the enemy belligerent during wartime. This crucial point is not argued but assumed. On page 30 of its brief appellee says,



“It is well settled that a statute which is uniform in the obligation of all members of a *legitimate* class to which it is made applicable is not violative of the due process clause of the Fifth Amendment”.

As we pointed out (App. Op. Br. p. 43), naturalization is merely an open declaration of permanent adherence to the enemy. *If the same acts of adherence-aid-and-comfort are legal after such a declaration, but illegal without it, then the real crime would seem to be not the adherence-aid-and-comfort, but the intent sometime to resume the rights of a United States citizen!*

We submit this is not a legitimate classification. It is certainly not the crime of treason *as defined by the Constitution*.

Appellee's arguments about “travel abroad” (Br. p. 31) are clearly not applicable where the naturalization takes place *in wartime to the opposite belligerent*.

To say, as appellee does (pp. 30-31):

“Those who exercised the privilege granted by the Nationality Act of 1940 surrendered all rights as United States citizens, and they also lost its burdens.”

confirms the view that the essence of the charge against appellant was her *intention to resume* the rights of an American citizen after the war! That is not treason as defined in Art. III, Sec. 3. *Besides it is neither logic nor justice nor common fairness to punish for treason those who in a hostile country cling to what they conceive to be their American citizenship, while exonerating those who otherwise act the same but repudiate their American*

*citizenship and permanently join the enemy in the middle of a war.*

It is such elementary justice and fairness that the Fifth Amendment was designed to protect.

Since the discrimination is an established governmental policy, the cases on mere failure to prosecute others do not apply. (App. Br. p. 30 n. 13.) So held in *Yick Wo v. Hopkins*, 118 U.S. 356, regarding the discriminatory administration of a law fair on its face. *Here the discrimination is in the legislative pattern itself.*

Likewise it is the intention of Constitution Art. III, Sec. 3 to prevent the use of a treason charge against any acts other than those which it defines.

Under either Art. III, Sec. 3 or the Fifth Amendment, the present prosecution was unconstitutional.

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#### **IV. DENIAL OF SPEEDY TRIAL AND DUE PROCESS THROUGH DELAY AND DESTRUCTION OF EVIDENCE. (Appellee's Br. pp. 31-36.)**

##### **A. DENIAL OF SPEEDY TRIAL.**

On page 32 appellee says that when appellant was imprisoned for a year in Japan—

“At that time she was detained as a security safeguard \* \* \*”

*This is untrue*—as we shall show in detail when we discuss appellee's contention regarding the confessions.

Appellee also argues that appellant was not detained by the Department of Justice. (Br. p. 32.) But obviously,

the Constitution *protects against all governmental action*, not merely against the Justice Department.

If a request for a speedy trial during this confinement was “premature” (Appellee’s Br. p. 33) then no request was necessary during the confinement at all. But a year’s confinement—largely incommunicado—for suspicion of the very offense with which appellant was later charged must have some legal effect. The government’s position, that it should be lightly and wholly ignored, is untenable.

---

#### B. DENIAL OF DUE PROCESS.

The recordings taken at Hawaii and the scripts delivered to Kaduson were either destroyed or lost by the government before the trial. Appellee is wrong in saying (p. 34),

“there is nothing to show whether the evidence would have been favorable or unfavorable to appellant, and her argument is based entirely on speculation and not on fact”.

In the *first* place, most of the extant scripts are favorable to appellant; in the *second* place, where evidence has been made unavailable by the act of one side it is presumed to be unfavorable to the side which did away with it. (See *Austerberry v. U. S.*, 169 F. (2d) 583, 593; *The Bermuda*, (*Haigh v. U. S.*), 70 U.S. 514, 550.)

On page 36 counsel say, “Moreover, the fact that evidence is no longer available is no defense to a criminal action”. Of course, that is not the point. The point is

that the *evidence was made unavailable by the acts of the same Government which prosecutes the defendant.*

Appellee says (p. 35):

“The remaining transcripts were government records. The prosecutor was not suppressing them.”

At App. Op. Br. p. 54 we said that destruction of evidence by the government had the same effect whether it was “routine destruction, negligent loss, or intentional suppression”.

While we have discussed all angles of the question, we are inclined to agree that the *prosecutor* was not suppressing the Hawaiian records. Defendant had been held in prison for a year, investigated during that time, and then released. The transcriptions of her broadcasts were probably thrown away either as innocuous or because the case was considered closed, or both. They were probably gone long before the present prosecutors got into the case. *In this view the fault lay not in destroying the evidence but in reopening and pressing the prosecution after the evidence had been destroyed by the government itself.*

But the violation of due process is equally great either way. The government prosecutes a woman after it has itself made material and probably favorable evidence unavailable to her. In other words, it does not matter in what order the acts are done: whether the government first destroys material evidence under its control and then institutes the prosecution, or whether it institutes the prosecution and then destroys the evidence.



The testimony of Miss *Roth* furnished no basis for believing that any records could be produced and consequently no basis for a demand. (See Appellee's Br. p. 35.) The very fact that Exhibits 63 and 75 were alone preserved indicates that they were thought different from the general run. (Cf. Appellee's Br. p. 35, ft.)

So far as Kaduson and Cowan are concerned, appellee says they "were not intelligence officers but were information specialists engaged in making a sound film of appellant for the purpose of providing information for and education of military personnel".

In either capacity they would be acting on behalf of the Army, a branch of the United States government. Since the scripts apparently became lost after coming into their hands, they became unavailable through the neglect of the same government which is prosecuting the case.

Counsel also say (p. 35) "there is no basis for any assumption that the prosecutor considered the missing scripts as being favorable to the appellant". The trial record does not even show that *the prosecutor* ever saw these scripts. The above statement is the first intimation that he is familiar with their contents. The record shows that defense counsel telephoned Kaduson in New York and that he would not speak to us, but threatened to report us to the F.B.I. for trying to interview him. (XLVIII-5346-47.) The result must be the same whether the scripts became unavailable through the negligence of the Army or the acts of the Department of Justice. In either case the government which prosecutes has, by its

own act or neglect, made material and probably favorable evidence unavailable to the defendant. That, we submit, is not due process of law.

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## V. DENIAL OF PUBLIC TRIAL, COMPULSORY PROCESS. (Appellee's Br. pp. 36-39.)

### A. PUBLIC TRIAL.

Appellee cites four cases besides *Gillars v. U. S.*, 182 F. (2d) 962, which we discussed in our opening brief.

In *Gibson v. U. S.*, 31 F. (2d) 19 and *Steiner v. U. S.*, 134 F. (2d) 931, the defendant either consented to non-public proceedings, or did not object at the trial. *Callahan v. U. S.*, 240 Fed. 683 impliedly follows *Reagan v. U. S.*, 202 Fed. 488; besides the judgment was reversed.

*Reagan v. U. S.*, 202 Fed. 488, points out that the question is one on which authorities differ; but says that a rape case offers a basis for the exercise of the Court's discretion.

*In the present case there is no basis: it is not claimed that earphones could not have been furnished for the spectators.* Under any view of the requirement of a public trial, there was no justification for excluding the public from part of the proceedings.

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### B. COMPULSORY PROCESS.

Appellee discusses this subject as if occupied Japan were a foreign independent country. But Exhibit B attached to appellee's brief shows that it was governed by

the United States. As we pointed out in our opening brief, p. 186, occupied Japan is in the same position as the outlying possessions of the United States. The District of Columbia Court of Appeals evidently took this view as to occupied Germany. (*Gillars v. U. S.*, 182 F. (2d) 962, 978.)

The question of costs raised by appellee on page 39 is beside the point since the motion for production of witnesses was denied outright, not made to depend on costs. In footnote 16 on page 39 appellee says, "It should be noted that despite her plea of poverty, appellant had access to sufficient funds to send an investigator to Japan to accompany her attorney, and to bring two witnesses from Australia."

*For the information of the Court, the attorneys representing defendant have done so because they consider the prosecution to be unjust, outrageous and tyrannical; they have not only worked without fee but have advanced money out of their own pockets; a few costs of the defense have been paid by the defendant's father.*

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## VI. JURISDICTION OF DISTRICT COURT (Appellee's Br. pp. 39-41.)

Appellee merely repeats the opinions in the *Chandler* and *Gillars* cases. It makes no attempt to answer our analysis showing that these cases are unsound and should not be followed in the Ninth Circuit.

## VII. INSUFFICIENCY OF EVIDENCE.

(Appellee's Br. pp. 41-44.)

Appellee recites evidence which, it claims, shows treasonable intent. We *assumed* as much in our discussion of this point. Our position is that there is uncontradicted evidence on another phase of the case which tends to counteract the evidence cited by the prosecution and which upon the whole record leaves a reasonable doubt as a matter of law.

Appellee's only reply on this score is the suggestion that in helping allied prisoners of war defendant "could have been motivated by other reasons: pity, friendship, gratitude or affection".

There is no evidence supporting such a suggestion. In fact, as appellee points out on page 76 of its brief *defendant had very little personal contact with most of the prisoners.*

On the whole record, systematic and continued aid to allied prisoners, most of whom she hardly knew, throws a reasonable doubt upon her supposed treasonable intent. *Since that doubt arises from uncontradicted evidence given by witnesses on both sides, it raises a question of law for the court, not merely one of fact for the jury.*

*Craig v. U. S.*, 81 F. (2d) 816, 827, dealt with the effect on appeal of *conflicting* evidence—an entirely different question.



**VIII. CONFESSIONS OF APPELLANT.**  
(Appellee's Br. pp. 44-62.)

At the beginning of this brief we cited the references which perhaps should have been put into the opening brief—showing where we objected to the various confessions of the defendant.

The following citations will show that we protected the record in a few other respects in which appellee claims we did not do so.

On page 48 appellee says:

“It is well to remember that appellant did not at any time during the trial of this cause object to the introduction of *any exhibit or any oral testimony* on the ground that the evidence was obtained in violation of the rule laid down in the McNabb case.”

On the contrary, we objected to the testimony supporting *Exhibit 2 on the second day of the trial*, as follows:

II-97:7-13 “Mr. Collins. If your honor please, I ask at this time that all the testimony of the prosecution's witness Eisenhart be stricken from the record on the ground that the testimony he has given concerning the execution of their document is inadmissible *inasmuch as it was obtained within 30 days or approximately 30 days after her original confinement and while the defendant was confined at Sugamo prison.*”

In other instances we objected that the respective confession “violates the extra judicial confession rule” (see references at beginning of this brief). Counsel say (p. 49) that the McNabb rule had been in effect over six years at the time of the trial. They are really complain-

ing that although it had been on the books for over six years *they were still ignorant that it formed part of the rule governing extra-judicial confessions*. See, also, *Carignan v. U. S.*, Dec. 8, 1950, No. 12517, Ninth Circuit.

On page 56 appellee says:

“In her brief appellant makes no showing that she ever objected to the admission of these exhibits in evidence upon the specific ground that the Government had failed to prove their voluntary character.”

The omission to give references in the opening brief has been supplied at the beginning of this brief. The Court will see that we continuously objected that *no foundation had been laid* for the confessions. At I-42: 21-23 we expressly said that the duty was on the prosecution to lay a foundation that the confession was free and voluntary.

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#### A. EXHIBIT 24.

In trying to sustain the admission of Exhibit 24, appellee manufactures a new record by introducing Appendix B (Br. p. 141) which was never offered in evidence and by ignoring the documents which *are* in evidence.

Its arguments seem to run as follows:

(1) Appellant was supposedly not arrested by the United States but by an International Commission (citing *Hirota v. MacArthur*, 338 U.S. 197);

(2) Appellant was supposedly not arrested for past acts but for future security; so that

(3) She supposedly could be held *indefinitely without charges* by the Army;

(4) Since her detention was legal, *Exhibit 24* was validly taken.

Conclusion No. 3, *supra*, is so barbarous as to seem wrong on its face. But an examination of the record shows that the “facts” upon which appellee purports to base this conclusion are *manufactured out of the whole cloth*—probably another “inadvertence”.

Appellant was not arrested or held by any international organization, but by the United States Army; she was not arrested or held for future security but for past acts.

# 1. TRUE FACTS OF APPELLANT'S ARREST AND DETENTION IN JAPAN.

## a. Appellant arrested and held by United States Army.

*Hirota v. MacArthur*, 338 U.S. 197, held that the petitioners had been tried before an international tribunal, not a Court of the United States, and that therefore the United States Supreme Court had no appellate jurisdiction. By citing this decision appellee implies that appellant was not held or arrested by American authorities, but by some international organization. *The facts are contrary. Exhibit P* states that it concerns

“The apprehension and detention of Persons by United States forces in Japan and Korea.”

(Even apart from this, appellee's Appendix B is a wholly American document. It emanates from the United States President, State, War and Navy Departments—not from any international body.)

b. Appellant arrested solely for past acts.

Appellee talks grandly and vaguely about "the law of the military, the law of war" (Br. p. 50) and says that appellant was interned as a *prospective* security measure, because (p. 51) "To allow her to remain at large might be dangerous to the occupying forces." *Again the facts are contrary.*

Exhibit P orders three classes of persons to be apprehended:

- (1) American citizens;
- (2) citizens of neutral countries;
- (3) citizens of enemy countries other than Japan.

The exhibit specifies separate grounds of detention for each of the three groups.

*Group (1). American citizens*—included only those "suspected of the guilt of treason, sedition, or war crimes". In other words, the order as to American citizens *covered only past acts*—it did not deal with "future security" at all.

*Group (2)—citizens or nationals of neutral countries*—covered only those "suspected of guilt of war crime or who commit overt acts endangering the security of our forces".

As to them the order was directed to (a) past acts and (b) future acts *actually committed* (not merely anticipated).

*Group (3) enemy nationals other than Japanese*—these and *these alone* are ordered arrested if they "are officially



identified by the counter intelligence corps as constituting a threat to the security of our forces”.

Consequently the military discretion as to future security upon which appellee bases its whole justification of her arrest, would apply to defendant only if she were classified as a *non-Japanese enemy* national.

Not only is this palpably absurd, but Exhibit N shows affirmatively that it was not done.

Exhibit N shows both that appellant was classified as an American citizen and that she was arrested and held solely for past acts. She was released by the Army when investigation of those past acts showed that they did not constitute any military offense.

*Exhibit N* first states (October 23, 1946) “subject was apprehended for suspected treason in connection with wartime propaganda broadcast from Radio Tokio”.

For October 25, 1945 there is a notation “Iva Tagori (sic) *American* (Nisei)”.

For May 1, 1946, there is the entry: “On the evidence adduced she is not considered subject to trial by military authorities *for any offence against military law.*”

She was accordingly turned over to the civil authorities.

Thus Exhibit N demonstrates that appellant was arrested and held under class (1) as set forth in Exhibit P. She was ordered arrested and detained as an *American citizen solely for past acts*. The Army released her when it found she was not subject to trial *for any offence against military law*.

Thus the "discretion" regarding future military security on which appellee seeks to justify the detention *was never exercised*. In fact Exhibit P constitutes a *finding against the need of such security measures* in appellant's case, since the measure was taken expressly against non-Japanese enemy nationals, and *not* against United States citizens or neutrals. Appellant was affirmatively classified as a United States citizen.

## 2. APPLICABILITY OF McNABB RULE.

Appellee claims that the six months' detention does not invalidate *Exhibit 24* because the detention itself was supposedly legal. (Appellee's Br. p. 55.)

To arrive at this conclusion, appellee contends that appellant was without the protection of either civil or military law. (See Appellee's Br. pp. 51-2, that civil protection does not apply; pp. 52-3, that military protection (10 U.S.C. 1542) does not apply.)

But there is no authority for such a view. *In re Yamashita*, 327 U.S. 1, dealt with *enemy soldiers*—not with American citizens (which is how the American authorities classified defendant at this time, and the basis of the treason charge). Furthermore, *In re Yamashita* did not involve violation of a domestic, civilian statute of the United States. (18 U.S.C. 1.)

Since appellant *was not arrested for the sake of "security"* it is unnecessary to elaborate on the proposition that any such indefinite confinement would almost certainly be unconstitutional and a confession taken during an unconstitutional confinement would be even more clearly "use by the Government of the fruits of wrong-

doing by its officers"—than a confession taken during a confinement which violates only a statute.

*The only question is whether defendant's arrest and detention may be justified for past acts.* We cited both the civil and military law to show that they were alike in requiring prompt trial. Appellee says 10 U.S.C. 1542 covers only persons attached to the Army.

Appellee's remaining argument on this point is unsound. *Kronberg v. Hale*, 180 F. (2d) 128, refers to *Humphrey v. Smith*, 336 U.S. 695, a *habeas corpus* case which merely held that violation of another clause of 10 U.S.C. 1542 did not deprive the court martial of jurisdiction to proceed. Loss of jurisdiction is not an element of the *McNabb* rule.

It is our position that defendant is governed by the civilian law. She is charged with a civilian offence which applies only to American citizens. (18 U.S.C. 1.) It is true this offence includes acts committed outside as well as within the United States. But there is nothing to indicate that the *procedure* varies with the locus of the acts charged. Exactly the same statutes govern under all circumstances—whether the indictment alleges acts committed within or without the borders of the United States. Consequently, the *McNabb* rule applies to appellant's case. Since *no effort whatever* was made to bring her to trial, her detention for six months was unlawful. And this unlawful detention was capped off by delivering her into the custody of a *department of justice agent for an unlawful purpose*—i.e., “for the purpose of interrogation”. She was in this illegal department of justice custody when Exhibit 24 was taken.

Appellee says (Br. p. 49) "she was not charged with treason or any offence". Exhibits N and P show that she was arrested on "suspicion of treason". If this is not a charge of crime it only proves that *appellant's detention was not only much too long, but illegal in the first place.*

The cases which appellee cites are clearly not in point. *Dow v. Johnson*, 100 U.S. 158, Br. p. 50, holds that the officers of an invading army are not answerable in the *Courts of the enemy country*. *Dooley v. U. S.*, 182 U.S. 222, Br. p. 59, holds that an invading army is not bound by the U. S. Constitution in governing conquered territory. *Madsen v. Kinsella*, 93 F. Supp. 319, Br. p. 50, involved *violation of the German criminal code*. The present case does not involve violation either of a Japanese statute or of an American Army regulation for the government of occupied Japan; it has nothing to do with the government of Japan as such. It involves the alleged violation of a domestic civilian statute of the United States (18 U.S.C. 1); all proceedings taken in connection with it are not part of the government of Japan but are *ancillary to the enforcement of this United States statute.*

For this same reason the quotation from *Gillars v. U. S.*, 182 F. (2d) 962, Br. p. 50, is likewise inapplicable.

Nor are there any facts paralleling the confusion and pressure under which authorities worked immediately after the Austrian surrender in *Best v. U. S.*, 184 F. (2d) 131, Br. p. 50. Not only was everything orderly even immediately after the Japanese surrender, but *defendant was kept in jail for six months*. She was released when investigation failed to show a military offence (Exhibit N)—*not* on the claim that previous supposed disorders had subsided. She was then turned over to the civilian



authorities "for the purpose of interrogation". In short, there was no evidence which even tended to excuse the six months' detention or the illegal custody by Tillman which followed it.

The cases on appellee's Br. p. 52 are likewise not in point. In them the confession was taken immediately and *then* the defendant was held unduly long. They hold that *subsequent* detention does not invalidate the confession. Here of course, defendant had been held six months *before* the confession and she was held illegally "for the purpose of interrogation" *during* the confession.

Of the cases cited on appellee's Br. p. 56 *Gulotta v. U. S.*, 113 F. (2d) 683 applied the same rule to both confession and admissions. *Ercoli v. U. S.*, 131 F. (2d) 354 involved a *judicial* admission, i.e., a statement under oath in open Court; *Dimick v. U. S.*, 116 Fed. 825, was decided long before *Ashcraft v. Tennessee*, 327 U.S. 274. The latter confirmed the holding of *Bram v. U. S.*, 168 U.S. 532, that a statement recounting defendant's version of the charges is subject to the confession rule even though partly exculpatory. Two United States Supreme Court decisions ought to be enough to settle the point.

Exhibit 24 was therefore taken under clearly illegal circumstances. Its admission violates the McNabb rule and requires that the judgment be reversed.

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## B. EXHIBIT 2.

Appellee says of Exhibit 2 (Br. p. 54):

"It was *not* introduced as an admission on her part *but only* as a proved specimen of her handwriting to be used for purposes of comparison."

This is another untruth—probably another of appellee’s many “inadvertences”.

Identification of handwriting was not the sole reason for offering Exhibit 2 but *only one* of the reasons. See I-36:14-16.

“The Court. What is the purpose of the offer, counsel?

Mr. De Wolf. *First* to prove preliminarily the signature of the defendant.”

If appellee had been interested in proving *only* defendant’s signature, it could have done so without dragging in the “Tokyo Rose” element; on the other hand, the fact that appellee later pressed the “Tokyo Rose” issue by other evidence (see appellant’s op. br. pp. 180-181) shows that the prosecutors were interested in it for its own sake. Identification of defendant’s handwriting may have been *one object* of Exhibit 2; identifying defendant as “Tokyo Rose” certainly was another. The objection that it constituted a confession was expressly raised at the trial. (I-42:18-25.)

Appellee makes another misstatement in saying (p. 54):

“this exhibit was only an autograph given by appellant to one of her guards as a souvenir”.

Eisenhart wanted the autograph as a souvenir; but Eisenhart was not one of defendant’s guards; nor did he obtain Exhibit 2 from her himself. (*Eisenhart* I-53:14-20; App. Op. Br. p. 147.) Eisenhart asked the guard who did have her in his custody to get the signature. In other words, *Exhibit 2 was obtained by the intervention of the man who exercised official authority over defendant.* If in fact this

authority was exercised to secure a personal favor for a friend, the authority *was abused*. This circumstance makes the situation worse, not better.

The contents of Exhibit 2 are a confession. Self-identification as "Tokyo Rose" amounted to a confession of all treasonable broadcasting by women announcers which rumor or folklore had ever dreamed up in the Pacific area. Since this confession was obtained from the defendant by the person who then officially had her in his custody, it must meet the tests of a confession or be excluded. Appellee says (Br. p. 57) that our cross-examination brought out that defendant signed Exhibit 2 quite voluntarily. On the contrary Eisenhart merely denied certain forms of pressure and said he did not know of others. (See Appellee's Br. pp. 45-6; Appellant's Op. Br. p. 147.) *It is, of course, undenied that Exhibit 2 violates the McNabb rule.* (See App. Op. Br. p. 147.)

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### C. EXHIBIT 15.

#### 1. ORIGINAL INTERVIEW.

It is not denied that Lee and Brundidge locked defendant into a room with them when they took Exhibit 15; that Lee was armed with a 45; that they wore American Army uniforms. Appellee tells us that Lee was "a famous war correspondent". (Br. p. 46.) Perhaps that is the way famous war correspondents operate; perhaps that kind of ruthlessness helps raise them to fame. But when a statement which they obtain is offered as legal evidence, it must be measured not by the practice of

famous war correspondents but by the rules which the law has laid down to guard against involuntary confessions.

Appellee's citation of *La Moore v. U. S.*, 180 F. (2d) 49 (Br. p. 58) is wholly beside the point. It merely repeats the rule going back to *Sparf v. U. S.*, 156 U.S. 51, that a confession is not involuntary merely because made during a *legal* confinement; even where that confinement entails leg-irons. There was no element of *legal confinement* about Lee's locking defendant into a room with him. It was a wholly illegal confinement coupled with the show of force resulting from a .45 revolver and from the fact that Lee and Brundidge belonged to the army which had just conquered Japan.

## 2. SIGNING OF EXHIBIT 15 BEFORE HOGAN AND BRUNDIDGE.

Of the cases cited on appellee's Br. p. 60, only *U. S. v. Lonardo*, 67 F. (2d) 883 and *Steiner v. U. S.*, 134 F. (2d) 931, deal with inducements. The others deal with threats or deceit.

In *Steiner v. U. S.*, 134 F. (2d) 931, 935, the inducement was given by a private person *not working with government agents*. That is not the situation in the present case. Not only was Brundidge working with Hogan; he made his inducement to the defendant while defendant, Brundidge and Hogan *were all in the same room*. *U. S. v. Lonardo*, 67 F. (2d) 883 admits that it is contrary to authority. In effect it repudiates the requirement that a confession must be voluntary, holding it an "anachronism" (67 F. (2d) 883, 884, Col. 2). But the United States Su-



preme Court has since then vigorously upheld the rule that confessions must be free from either coercion or inducement. (*Watts v. Indiana*, 338 U.S. 449; *Turner v. Pennsylvania*, 338 U.S. 62; *Harris v. So. Carolina*, 338 U.S. 68 are the most recent). Consequently, this case is based on an approach which the United States Supreme Court has not adopted. *U. S. v. Lonardo* expressly admits that under the opinion of *Bram v. U. S.*, 168 U.S. 532, a promise of leniency would exclude a confession. (67 F. (2d) 883, 885.)

In the present case there is a direct assurance that if defendant signed Exhibit 15 she would have a better chance of returning to the United States. We submit that allowing the confession to go in under such circumstances would nullify the rule of voluntariness altogether. Cf. *Sorenson v. U. S.*, 143 Fed. 820 (CCA 8).

Moreover, fetching defendant from her home to headquarters constituted an arrest. (See Appellee's Br. p. 54; Appellant's Op. Br. pp. 145-6.) The argument that this was a "courtesy" to her (Appellee's Br. p. 54) is, of course, ridiculous since the *normal* way of interviewing her would have been *to go to her house*. Sending a government vehicle with soldiers to fetch her from her house to headquarters is the worst kind of arbitrary and oppressive conduct. It was not only an arrest but an arrest without warrant and for an illegal purpose (interrogation). Like Exhibit 24, Exhibit 15 purported to be a complete or nearly complete story of the defendant's case. Under the *Bram* and *Ashcraft* cases that is a confession, whether it contains exculpatory matter or not.

## D. THE ORAL CONFESSIONS.

On page 62 appellee makes a statement which would be funny if it weren't so serious, i.e., "the statement about being 'badgered' by correspondents was not \* \* \* made to induce her to talk to Kramer and Keeney but was advice given to guide her in her future relations with the press."

Talking to Kramer and Keeney was a part of her "future relationship with the press". The "advice" included a statement that "she would just be badgered by correspondents if she remained in seclusion". This goes directly to the question *whether the making of the agreement is voluntary*. (See App. Op. Br. p. 142.) Coming from members of an occupying army it is clearly *pressure to make the defendant talk*. Since she talked only under that kind of pressure, her consent to talk at all was extorted. After that, it is immaterial whether any additional pressure is exerted to procure her individual assertions. (*Bram v. U. S.*, 168 U.S. 532, 549, App. Op. Br. p. 142.)

Appellee says very little about the fact that appellant originally refused to give an interview and was "urged" by being told that he *owed one* to Yank magazine. We are informed (p. 62) "She was not being interviewed by arresting officers or by military police". This is an insubstantial distinction from the defendant's standpoint. *She was being interviewed by armed members of the occupying army on army business. For them to meet her initial refusal by saying that she owed them an interview hardly leaves her a free choice.*

**VIII-A. RULINGS ON VARIOUS ITEMS OF PROSECUTION EVIDENCE. (Appellee's Br. pp. 62-66.)**

For reasons best known to itself, appellee takes several items from the close of our brief and moves them into the first half of its own brief.

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**A. MORIYAMA.**

Moriyama testified to alleged statements by defendant but could not fix them more definitely than some time in a 16-month period. The fact that others supposedly present, allegedly appeared as witnesses is beside the point; they did not corroborate Moriyama's testimony nor supply any date which he omitted. The burden of proof was on the prosecution. Defendant denied the supposed statements entirely. We submit that when alleged incriminating statements are not fixed even within a year, no sufficient foundation has been laid for their admission.

*Graul v. U. S.*, 47 App. D.C. 543, (Appellee's Br. p. 63) is not to the contrary. It passed not upon an original agreement as to which the witness was indefinite, but upon the evidence of its *performance*. The opinion says (p. 547) "The testimony *that he brought men to the house* under the circumstances disclosed was competent."

Here the Court does not even rule upon the initial agreement, as to which the witness fixed no date within a year. At 47 App. D.C. 543, 548, the Court says that while a witness fixed no date for another occurrence, "he testified to facts which tended to fix it."

No such thing was true here. Evidence of alleged statements by defendant was admitted though the witness

could not fix the time closer than by 16 months. We submit this is too indefinite to serve as a foundation.

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#### B. ISHII.

It is well settled that the proper way to introduce statements is to have the witness repeat what was said. Generalizations as to what broadcasts "dealt with" are typical conclusions.

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#### C. CLARK LEE.

Clark Lee has already testified that he locked the door when he interviewed appellant. These were the facts. Then on redirect the prosecutor asked whether he "held Mrs. d'Aquino in detention". Obviously after the witness has recounted the facts, that defendant was in a room with him behind locked doors, to ask him "whether he held her in detention" calls for his conclusion.

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#### D. IGARASHI.

As to Igarashi the prosecution now wants to eat its cake and have it, too. It says that it could properly lead the witness because *at the trial* (in 1949) he had an insufficient knowledge of English. If that is so, he certainly was not qualified to testify as to the contents of *English* broadcasts which appellant made 4 or 5 years before.

On the other hand, if he could understand English in 1944 and '45 when he supposedly overheard appellant broadcast, there was no excuse for putting words in his



mouth in 1949, when his English had improved. (*Igarashi* XXIV-2649:8-10.) Appellee cites two cases in which the trial judge in his discretion *allowed* leading questions. (*Wagman v. U. S.*, 269 Fed. 568; *Linn v. U. S.*, 251 Fed. 476, Br. p. 644.) But in the present case the trial judge *sustained the objection* that the question was leading. (App. Op. Br. App'x. p. 75.) We raised the point because the judge's ruling could not cure the damage which had been done; the answer had been irrevocably suggested to the witness.

Since the judge *sustained* the objection, he never exercised the discretion upon which appellee's authorities are based. In fact he exercised a contrary discretion. The only point on appeal is that his ruling could not cure the damage from the prosecutor's improper question.

The situation here is the same as with the grounds for defendant's arrest in Japan (*supra*, p. 25). The prosecutors argue on the basis of a "discretion" which the record shows *was never exercised*. Apparently "discretion" is the last refuge of an erring prosecutor. And when none exists they have to invent one. Probably an "inadvertence".

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#### E. EXHIBIT 25.

As pointed out in our opening brief (App. Op. Br. p. 226) part of Exhibit 25 went beyond the contents of Exhibits 16-21. This extra part was in no way identified. Neither side offered that part, but the Court put it into evidence on its own motion.

Appellee does not deny that the Court was in error, but claims only that the appellant supposedly did not object.

The record (App. Op. Br. App'x. p. 93) shows that when this happened Mr. Collins twice tried to say something but was interrupted both times. The prosecutor stated (App. Op. Br. App'x. p. 94) that he didn't think the extra pages ought to be in.

Since the matter came from the Court, not from the prosecution, since defense counsel was cut off when he tried to speak but counsel for the prosecution put in an objection with which the defense agreed, we submit the objection was made clear in the trial Court. The record is sufficient to raise the point on appeal.

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#### **F. EXHIBIT 75.**

As to Exhibit 75, appellee merely repeats the position which it took in the trial Court. Our opening brief shows that the points are both untenable and insufficient to sustain admission of the exhibit. (App. Op. Br. pp. 227-8.) Appellee does not try to answer our contentions.

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### **VIII-B. IDENTIFICATION AS "TOKYO ROSE".** (Appellee's Br. pp. 66-68.)

#### **A. ADMITTING NOTATIONS ON EXHIBITS 16-21.**

1. *Appellant does not attempt to defend the admission of Sodaro's notation "Tokyo Rose" on Exhibit 21.* The "foundation" for this item was that it has been written on the record "in the regular course of your hobby"! (Sodaro, XVII-1725:16-21.) This notation was obviously and crudely hearsay.

Nor does appellee dispute *Prevost v. U. S.*, 149 F. (2d) 747 that such *ex parte* expressions of opinion are hearsay and not within the official records rule, even where the document is in the witness's official custody. *Nor is any answer made to the point that the witnesses were engineers, and commentaries upon the contents of the broadcast were not within their official duty in any event.* (App. Op. Br. p. 180.)

The cases which appellee cites all involve recordation of factual data or permissible opinion of experts, not expressions of non-expert opinion. *Evanston v. Gunn*, 99 U.S. 660, (Appellee's Br. p. 67), involved a name on a ship's passenger list; *McInerny v. U. S.*, 143 Fed. 729 (Br. p. 67)—meteorological observations, *Runkle v. U. S.*, 42 F. (2d) 804, and *U. S. v. Cole*, 45 F. (2d) 339, were both physician's reports after examining a patient.

#### B. PREJUDICIAL EFFECT OF ADMISSION.

On various grounds appellee claims the erroneous admission of these "Tokyo Rose" notations to be non-prejudicial.

We shall take a general view of this phase of the case before making a detailed answer.

"Tokyo Rose" was an element which did not belong in the case at all. The Japanese radio never used that name—defendant broadcast as "Orphan Anne".

Standing by itself, "Tokyo Rose" has no meaning whatsoever. Without further explanation, it could be the title of a novel, the sobriquet of a stage actress, a private term of endearment, or any number of other things. *The expression acquires meaning and relevance in this case*

*only by reference to rumors and folklore current among Americans (both soldiers and civilians) during the last war. But these rumors and folklore are wholly outside the record, and are not a legitimate element in the case. Thus, introducing the name "Tokyo Rose" was an appeal to extraneous and improper gossip and rumors, and therefore to popular prejudices. By bringing the phrase in with Exhibit 2, the prosecution made an appeal to prejudice and sensationalism right from the first day of the trial.*

It was bad enough to drag in the matter at all; any illegitimate reinforcement could not but have been prejudicial. This result is not changed either by (1) other evidence which the government introduced (e.g., Exhibits 14, 44), nor (2) by anything which defendant may have elicited on cross-examination.

When the prosecution introduced a whole series of exhibits labelling defendant "Tokyo Rose", it went out of the way to hammer an extraneous topic, serving no purpose but that of sensationalism. It certainly makes a difference whether such an irrelevancy is passed over lightly or emphasized. Introducing it with Exhibits 16-21 served to emphasize it, and therefore was prejudicial.

Nor is the error cured by anything which defendant may have brought out on cross-examination. Most of this cross-examination never would have been made had defendant's objections to the original evidence been sustained. The same is true of defendant's counter evidence. (See Appellee's Br. p. 68 top.)

In effect, appellee argues that appellant waived the objection to the direct evidence by cross-examining upon it or by introducing rebuttal. The law is the other way.



Cross-examination does not waive objections to direct evidence. 53 *Am. Jur.* 128; *Feuchtwanger v. Manitowac Malting Co.*, 187 Fed. 713, 719 (C.C.A. 7); *Goodale v. Murray*, 227 Iowa 450, 289 N.W. 450, 459; *Tabor v. Hardin*, 9 Ky. L. Rep. 491, 493.

Likewise the introduction of rebuttal evidence does not waive objections to the plaintiff's evidence in chief. *Salt Lake City v. Smith*, 104 Fed. 457, 470 (C.C.A. 8); *Goodale v. Murray*, 289 N.W. 450, 459; *Fernandez v. Western Fuse Co.*, 34 Cal. App. 420, 423-4, 167 P. 900.

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## IX. THE DEFENSE OF DURESS. (Appellee's Br. pp. 68-77.)

By and large the appellee makes two arguments against our position on duress: (1) a refusal to admit that the authorities distinguish between duress by individual gangsters, where the victim normally has a chance for police protection and duress of a hostile government, where the victim has no protection whatever; (2) misstatements of the evidence. Virtually the only other contention is that the English crown law authorities which we cited say that the defendant's acts must begin while the party is under actual force.

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### A. DISTINCTION BETWEEN CASES WHERE DEFENDANT CAN GET PROTECTION AND WHERE HE CANNOT.

All but two of appellee's cases cited at pages 69-70 of its brief are cases of duress by *private criminals*. *R. I. Recreation Center v. Aetna Casualty Co.*, 177 F. (2d) 603, is important. (See appendix, p. iv.)

In *U. S. v. Haskell*, Fed. case No. 15321, the “duress” came from a single crew member, whom the Captain threw overboard single-handed.

The only cases not in this category are *Respublica v. McCarty*, 2 U.S. 86, discussed on page 108 of appellant’s opening brief, and *U. S. v. Vigol*, 2 U.S. 346, also cited on page 108. The latter involved a small local disturbance which was held not to have deprived the inhabitants of resort to legal protection.

Appellee does not dispute the English authorities cited by us (App. Op. Br. pp. 105-106) except in one respect. *It does not dispute the two American cases at all.* (*Miller v. The Resolution*, 2 U.S. 1; *U. S. v. Greiner*, Fed. Cas. No. 15262, App. Op. Br. pp. 107-8).

After citing these cases of private lawlessness, appellee says (Br. p. 71):

“Appellant’s apparent (sic) argument that, where a person cannot obtain protection from his own government, coercion is a broader defense is *not* therefore consistent with the foregoing authorities.”

In other words, appellee says that our contention is “inconsistent” with authorities *arising on different facts*.

On page 71 appellee argues that giving weight to the fact that the defendant could get no protection “suggests a most dangerous rule of law, since all traitors under the protection of an enemy could later shield themselves from prosecution by setting up extraneous reasons for a mental fear of possible future actions on the part of the enemy.”

This is a strange argument to say the least. Being wholly in the enemy’s power has been recognized as a

relevant factor by both English and American law for the last 200 years! Moreover *R. I. Recreation Center v. Aetna Casualty Co.*, 177 F. (2d) 603 adopts the same line of reasoning. It lays great emphasis on the opportunity for police protection where that was *present*; equally great emphasis must be given to lack of protection where it is wholly *absent*.

On page 70 appellee refers to the language of *Foster* and *East* (App. Op. Br. Appx. pp. 15-17) that there must be "an original force upon him". This language goes to the point that the force must be upon the person rather than upon goods. (See *McGrowther's Case* (1746), *Foster's Reports* (2d ed., 1776), p. 13, 168 Eng. Rep. R. 8.) In that case the "force" consisted of a threat with present power of execution. Since it was to burn houses rather than to injure the person, it was considered insufficient. But apparently a *threat with present power of execution* satisfies the requirement of "force".

Compare also the cases on abandonment of citizenship:

*Dos Reis v. Nicolls*, 161 F. (2d) 860, 862;

*Schioler v. U. S.*, 75 F. S. 353, 355;

*In re Gogal* 75 F. S. 268, 271,

described as "cases of real duress" in *Savorgnan v. U.S.*, 338 U.S. 491, 502, n. 18.

Appellee also says (p. 72) that "immediacy \* \* \* is necessary in a defense of this type. Without it the defense must fail". This again is the law with respect to duress from private criminals. As we pointed out in our opening brief, this element is not indispensable for duress from a hostile government—and *Foster actually italicizes that proviso in his own text*. (See App. Op. Br. App'x. pp. 15-16.)

Government duress operates less crudely than the duress of an individual gangster. Yet it is the most certain, the most irresistible and most inescapable of all. Appellee, however, wants it eliminated as a defense.

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#### B. MISSTATEMENTS BY APPELLEE.

Appellee says (Br. p. 72):

“Appellee does not seriously contend that she was ever at any time threatened with immediate death or serious bodily harm if she refused to work as a broadcaster at Radio Tokyo.”

That is not true. We claim that *Takano's threat carried exactly this meaning*, subject only to such delay as might result if legal machinery were put in motion. See appellant's opening brief, pp. 76-7. The fact that Takano's language contained references unexplained on their face permitted evidence which would furnish an explanation; it did not nullify the original testimony. Consequently appellee again *misstates the record* when it says in Br. p. 73:

“Therefore, her own testimony concerning how she became a broadcaster contains no statement of the application of such force or *threat of force* as to lead her to believe that she was in immediate or imminent danger of death or serious injury.”

The fact that appellee's witnesses testified on direct examination that they were aware of no duress on defendant (or even on themselves) is beside the point on this appeal. The issue of duress was not tendered by the prosecution, and does not come up on any claim of in-



sufficiency of evidence to uphold the verdict. The issue comes up (a) on refusal of instructions requested by the defense and (b) on rulings on evidence. Defense instructions, in particular, must be given if there is substantial evidence supporting defendant's side of the case. (See authorities cited, App. Op. Br. p. 84.) Consequently, on this issue the crucial question is whether there was substantial evidence supporting the defense, not the prosecution.

Many of the government's witnesses who testified on direct examination that they knew of no duress, admitted on cross-examination that they themselves had been subjected to it. (See App. Op. Br. p. 82.) Ruth Hayakawa testified that all threats and pressure were administered in secret. (Hayakawa, R. 392.) At Br. p. 74 appellee says: "If appellant had produced competent evidence that she had been threatened" etc.—as if her own testimony was not competent.

Also on page 74 appellee says:

"She is, in effect, trying to avoid the necessity of such a threat or of positive action by any Japanese in authority by showing that she was afraid, because of other circumstances, to refuse. It is at exactly this point that her whole defense breaks down. She cannot excuse herself on the ground of what she thought might happen to her. \* \* \*"

"\* \* \* There must be actual danger, not a danger conjured up in the mind as to what might happen."

*Yet when defendant offered evidence to show that the danger was real the appellee objected and excluded much of the proof. (See App. Op. Br. pp. 87-100.)*

At page 76 appellee says:

“The quotation in her brief at page 89 is that of an argument made to the court \* \* \*”

On the contrary, the quotation is of an *offer of proof*. (Appellee did its best to obstruct our offers of proof at the trial. (App. Op. Br. pp. 90, 216-17.) It now apparently wants to deny their existence where we managed to make any.

Likewise on page 75 appellee misstates the record in saying “the anger of her neighbors was not directed to her radio activities but toward her Christmas spirit”. (Br. p. 91.) As shown in our opening brief (App. Op. Br. p. 91) this testimony was offered explicitly to show hostility against her as an American citizen following American customs. Any ambiguity would have to be taken *in favor of defendant*, since this is not a question of sufficiency of evidence to sustain the conviction, but of relevancy to the defense.

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### C. RULINGS ON EVIDENCE AND INSTRUCTIONS.

#### 1. EVIDENCE.

a. As we have already said, appellee makes no attempt to justify excluding the last answer in Ruth Hayakawa's deposition. This refers to the state of terror pervading the entire radio Tokyo staff. (App. Op. Br. p. 91.)

Appellee's attempts to justify the rulings on evidence seem to be (a) that defendant's own evidence supposedly does not serve as a basis; (b) the effect of admitting such evidence would have been “to inflame the jury against the Japanese” (!) (p. 73 ft.); (c) the order of proof and

limits of cross-examination of appellee's witnesses; (d) that the rulings were non-prejudicial because the jury had "enough" evidence of appellant's situation in Japan.

Appellant's own testimony showed a threat with present power to perform. The things which Takano told her were unquestionably threats. (App. Op. Br. pp. 76-7.) Because of their indirect language, they were the basis of explanatory evidence. Appellee itself emphasizes that Radio Tokyo was under the Japanese military. (Appellee's Br. pp. 10, 11.) There was undoubted power to perform—against the Japanese government or its agencies, appellant had no protection whatever. The very attack which appellee makes upon defendant's testimony—that there must not be merely "a danger conjured up in the mind as to what might happen"—indicates the relevancy of the evidence which appellant offered but the judge rejected. The fact that some of the prisoners may have been in a different category from herself (Appellee's Br. p. 75) goes to the weight of the evidence only. The evidence is always relevant on the basic point—that the Japanese imposed barbarous penalties for trifling offences.

b. It is a curious objection that the offered evidence was "of such a nature as to inflame the jury against the Japanese". This objection assumes the evidence to be relevant. Apparently appellee thinks it more important to preserve the jury's friendly feelings (if any) toward the Japanese than to permit defendant to introduce evidence relevant to her defense. The government seems much more tender toward its former enemies than toward those whom it claims as its citizens. Besides, evidence which is otherwise admissible, does not become inadmissible because it may be inflammatory. *Prudential Ins. Co.*

*v. Faulkner*, 68 F. (2d) 676, 678; *Mohn v. Tingley*, 191 Cal. 470, 491, 217 Pac. 733, 742, col. 2.

c. As we showed in our opening brief (App. Op. Br. pp. 92-5) the government sometimes objected on the ground of "improper cross-examination", but more often only on the ground of "immateriality". The Court sustained both lines of objection. The latter, at least, is clearly open to review. Furthermore, since Tsuneishi, the army head of Japanese broadcasting (Appellee's Br. p. 11) was called to give the general picture of operations at Radio Tokyo, we submit that duress imposed on the broadcasting staff was within the scope of the direct examination.

Similarly, when defendant offered evidence, objections were made on grounds of "immateriality" much oftener than on ground of the order of proof. (App. Op. Br. p. 95.) So far as objections were sustained for immateriality, they may be reviewed. We submit, moreover, that the trial Court abused its discretion to the extent that it sustained government objections based on the order of proof. This point came up while Cousens was on the stand. He was a witness from Australia. (XXVIII-3097:11-16.) Everyone knows that where a defendant testifies he (or she) is usually put on after other defense witnesses. In this case the defendant was on the stand six days. (See App. Op. Br. p. 153.) When Cousens was on the stand, defense counsel assured the Court that he would show all the facts were communicated to defendant. Upon the assurance that the evidence would thus be connected up, the Court was at first inclined to let the evidence in. (XXVIII-3127:3-22.) Then, on the government's insistence, it reversed itself. (XXVIII-3135:13-17.) The whole defense could not



be proved from one witness; defendant put a witness from Australia on first. There was no basis whatever for refusing to let this witness tell what he knew while he was on the stand. But, as we have said, most of the government's objections were on the ground of "immateriality". This is clearly reviewable, and is discussed in our opening brief. (App. Op. Br. pp. 87-100, 117-121.)

d. Appellee's argument that there was "enough" proof of coercion is clearly wrong where the question is one of degree. Furthermore, in its instructions the Court took the evidence which went in and told the jury, item by item, that it was insufficient as a matter of law. (See App. Op. Br., pp. 113-114.) In view of this, the evidence which went in was certainly not before the jury in a way that it could be held to cure the exclusion of other evidence tending to emphasize the subject.

## 2. INSTRUCTIONS.

Appellee (Br. pp. 71-2) claims that it was not error to say that each item of proof was insufficient while omitting cumulative effect, but gives no reasons. Certainly logic is the other way—the whole issue is one of cumulative effect. In the *Scotch 1745* cases the issue of duress was always submitted "on the whole evidence". (App. Op. Br. App'x. p. 17.) Appellee says the charge "was almost entirely identical to that approved \* \* \* in *Gillars v. U.S.*", 182 F. (2d) 962, 976. Perhaps that is part of the trouble: there is nothing to indicate that the facts on duress were the same in the *Gillars* case as here. Furthermore, the *Gillars* case could decide only what it actually discussed. (See App. Op. Br. p. 120.) Appellee insists on the element of immediacy. (Br. p. 72.) We have shown

that it is neither held indispensable by the English authorities, nor is it apposite to governmental duress. (App. Op. Br. pp. 110-111.) But most important, the instructions wholly ignore the lack of opportunity to get any protection. As pointed out, appellee's own case, *R. I. Recreation Center v. Aetna Cas. Co.*, 177 F. (2d) 603 makes this an important factor. To disregard it completely is reversible error.

The same is true of the fact that defendant was an alien enemy in Japan—alone in a hostile country. (Appellee's Br. p. 72; App. Op. Br. pp. 73-4.)

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## X. THE GENEVA CONVENTION.

(Appellee's Br. pp. 77-8.)

Appellee admits that the Geneva convention applies to appellant if it applies in a treason case at all. However, it sweepingly asserts that the convention "in no way modifies or supersedes the criminal laws of the country". (Br. p. 77.) This seems to be mainly on the theory that "adherence" means any act done with intent to adhere to the enemy; and that if such intent exists the act is necessarily criminal. We submit appellee is wrong in both parts of its argument.

In the first place, the Geneva Convention is a later, more detailed statute than the treason act. (Domestically, a treaty is on a par with an act of Congress. (See App. Op. Br. pp. 122-4.) It is a principle of statutory construction that a later specific act modifies an earlier general act, if there is any inconsistency between them. (*Clifford F. MacEvoy Co. v. U. S.*, 322 U.S. 102, 107.)

The rest of appellee's argument is refuted by the very cases which it cites. *Cramer v. U. S.*, 325 U.S. 1, holds that the *overt acts* must themselves be criminal. *Haupt v. U. S.*, 330 U.S. 631, holds that certain types of acts may or may not be criminal depending upon intent. But that is as far as the law goes. Where the *act* can under no circumstances be criminal, no intent can turn it into treason. So an *act* definitely legalized by the Geneva Convention can not be treason, no matter with what intent it was done.

Appellant's instructions under the Geneva Convention submitted the issue whether defendant's *acts* were such as had been legalized by the Convention. This issue should have been submitted to the jury.

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## **XI. CROSS-EXAMINATION OF DEFENSE WITNESSES.** (Appellee's Br. pp. 78-94.)

### **A. CROSS-EXAMINATION OF DEFENDANT.**

#### **1. MAKING DEFENDANT PASS ON TRUTHFULNESS OF OTHER WITNESSES.**

##### **a. Questioning improper and prejudicial.**

Appellee defends its attempts to make defendant pass on the truthfulness of other witnesses on the grounds (1) defendant was subject to broad cross-examination; (2) The method used was a "challenge"; (3) *U. S. v. Buckner*, 108 F. (2d) 921, 929.

The prosecutor undoubtedly had a right to a broad cross-examination, but his *individual questions* had to be proper. They could not call for conclusions, as did those which were used.

Much the same goes for the argument that the questions were a “challenge” to defendant. Undoubtedly they were—but they also had to be *proper* questions. Not every “challenge” to the defendant is a legal way of getting evidence. For instance, third degree methods, torture to extract a confession—are certainly “challenges” to the defendant. But that does not make them legal. So with questions which make the defendant pass on the truth or falsity of other witnesses.

In *U. S. v. Buckner*, 108 F. (2d) 921, 929, the prosecutor asked a few questions of which the opinion cites *one* as an example. The trial Court soon cut that method of examination short. The Appellate Court says (p. 929),

“At any rate, we think the court committed no error in its choice of the point at which to terminate this questioning.”

In the present case the *objectionable questioning was not terminated*. On the contrary, after the judge had sustained some objections the prosecutor rammed ahead, apparently overwhelmed the judge, and continued on for 240 pages. The situation in no way resembles that of *U. S. v. Buckner*.

Since the questions were undoubtedly improper, so much repetition requires a reversal.

**b. Prosecutor misstated facts in questions.**

At appellee’s brief, page 81, it is claimed that the prosecutor did not misstate facts in his questions. It is also claimed that no prejudice occurs where the question is not answered. (See middle of page 81.)



Taking the latter point first—the prosecutor’s misconduct consists in putting untrue facts into his leading questions—quite independently of the answer which the witness may or may not give. This was held in *Berger v. U. S.*, 295 U.S. 79, where at page 84 the Supreme Court says the prosecutor

“was guilty of misstating the facts *in his cross-examination of witnesses*”.

In the present case the prosecutor *did* misstate the facts in his leading questions.

The cross-examination of Kuroishi shows that the direct examination incorrectly implies that defendant *applied for the broadcasting job*. Since Kuroishi (the government’s own witness) had *already testified*, by the time counsel started to make use of Exhibit 68 (Miss Ito’s statement to the FBI) counsel certainly knew then that Exhibit 68 was likewise worded ambiguously to give the same false impression. *Nevertheless appellee insisted on making the same misstatement a third time in questioning the defendant*. As already indicated, this misstatement was part of a question whether Miss Ito’s statement was true—an improper question in the first place.

The prosecutor stated (in a question) that Cousens “was against unconditional surrender”. This is unqualified and unlimited. It denotes unqualified opposition at all times. Cousens’ testimony (App. Op. Br. App’x. pp. 62-3) shows that he was originally for unconditional surrender, later against because of specific information which he had. (This was substantially the same view as that of General Ellis M. Zacharias, whose article in *LOOK* magazine of May 23, 1950 is filed with this brief.) *To say*

*Cousens was in unqualified, unlimited opposition, when the record shows he first supported and then opposed for specific reasons, is to misstate the record.*

## 2. MISREPRESENTATION OF EXHIBIT 9.

Appellee says (Br. p. 81) that our characterization of the cross-examination on reestablishment of citizenship “exceeds the propriety of the situation under consideration”. *On the contrary, words are inadequate to describe the nadir of ethics to which the prosecutor descended in trying to make defendant retract truthful testimony, the truth of which had been proven by one of the government’s own exhibits.*

Appellee tries to justify its position by saying (Br. p. 82) that defendant never filed an *application* for reestablishment—presumably meaning that Exhibit 9 is a letter and not on a printed form. But obviously that is not the point. *First*, some of the prosecutor’s questions are in the form “*You do not see anything in there about establishing or reestablishing American citizenship, do you?*” (L-5544:2-3; see also L-5541:19-21 in which the prosecutor denies that one of the exhibits “said something about reestablishing United States citizenship”; and L-5544:5-7.)

*Second*, the issue was not the mechanical one whether defendant expressed her desires on a printed form or in a letter. The issue was whether defendant had ever asked to have her American citizenship reestablished—indicating she believed she had lost it. The government took the position that defendant had never done so and that her claim that she did was a fabrication made up at the trial. *It insisted on maintaining this position though its own Exhibit 9 proved the opposite.*

## 3. IMPROPER CROSS-EXAMINATION ON OVERT ACT 8.

Appellee tries to justify the cross-examination on Overt Act 8 as (1) being relevant on the question of intention and (2) being one of the details of defendant's direct evidence. (Br. pp. 82-84.) Defendant did not testify as to Overt Act 8 on direct examination. She cannot be cross-examined upon it under either of the above theories.

*First*, overt acts are not proven to show intent. They are proven as overt acts, and if they do not themselves show intent, then intent may be shown by other evidence. (*Haupt v. U. S.*, 330 U.S. 631, 635-6; *Cramer v. U. S.*, 325 U.S. 1, 31-33.) Here the prosecution introduced other evidence—thus assuming that the overt acts did not themselves show intent. But where several overt acts are pleaded, *one is not introduced to show the intent of another*. Especially is this true of Overt Act 8—perhaps the most innocuous of all! (See *Mitsushio*, XI-978:22-25; *Oki*, IX-686:20-25.) It certainly could not be used to *supply treasonable intent* to any of the other overt acts.

Likewise cross-examination on Overt Act 8 cannot be sustained as a “detail” of the direct examination. First, Overt Act 8 is not a “detail” of Overt Acts 2, 3, 5 or 6 (on which defendant testified). It is a separate element of the charge. *Second*, Overt Act 8 is not a “detail” of the *collateral evidence* which the prosecution introduced on the issue of intent and as to which defendant testified.

*Overt Act 8 is part of the basic charges*—which the prosecution sought to bolster by collateral evidence of intent.

So cross-examination on Overt Act 8 cannot be sustained on either of the theories suggested by appellee. It was

cross-examination on an independent phase of the case regarding which defendant had not testified. *Tucker v. U. S.*, 5 F. (2d) 818, covers the point and requires a reversal.

#### 4. OTHER CROSS-EXAMINATION OF DEFENDANT.

On Br. pages 85-6 appellee tries to uphold some questions to defendant on *general* grounds. The *specific* objections to these questions were that they called for conclusions. Appellee does not deny that. On pages 86-7 appellee tries to justify asking defendant about a supposed conversation with her husband about Portuguese citizenship, by pointing to conversations *prior to the marriage* (1945) about her former American citizenship. (XLIIL-4785:18-23.) Portuguese citizenship was something arising after the marriage and the conversation was specifically referred to the time *after* appellant was returned to the United States (1948). Evidence as to one conversation does not waive objection to a different conversation held three years later.

Appellee also repeats the argument that its unobjected cross-examination of Phil d'Aquino extracted a waiver. But, we showed at pages 170-171 why the cross-examination of Phil d'Aquino was *not* a waiver, and appellee has not tried to answer these arguments. In *Wolfle v. U. S.*, 291 U.S. 7, the communication was revealed by the *communicating spouse*, which is not true here.

Compare generally *Blau (Irving) v. U. S.* (Jan. 15, 1951) 19 L.W. 4094, holding husband-wife communication presumptively confidential and commenting on *Wolfle v. U. S.*



## B. CROSS-EXAMINATION OF OTHER DEFENSE WITNESSES.

### 1. ITO.

We have already noticed the prosecutor's "inadvertence" in misstating Miss Ito's direct testimony. As we have shown, this type of "inadvertence" occurs throughout the trial and throughout the brief.

### 2. REYES.

Appellee argues that when the prosecutor tried to deny defendant and Reyes the right to explain, the judge nevertheless permitted an explanation. This is true: we cited the instances not as errors of the Court but as indications of the prosecutor's approach. The prosecution was not trying to get at the facts, but was actually trying to avoid them.

Appellee does not reveal how it was testing Reyes' credibility by asking whether Ince had married a Filipino woman. (Appellee's Br. p. 921.) *The government's claim that it was not playing on racial prejudices is answered by the fact that in selecting the jury, the prosecutors exercised their peremptory challenges on all the non-white talesmen (6 or 7 Negroes and one Chinese-American) and on no one else.*

The reference (Br. p. 91, ft.) to XXXIII-3746 only shows Reyes to have said that he gave a true statement to the FBI. It does not mention the contents of Exhibit 52. On page 124 of appellee's brief counsel themselves say that Reyes confirmed "many" of the statements in Exhibit 52—not that he confirmed all of them. By questioning Reyes about supposed scripts which were never identified (Gov. Ex. 55, 62, 63 for identification—Appellee's Br. p. 92) the prosecutor insinuated supposed

facts to the jury, unsupported by evidence. Such unsupported statements cannot be said to be nonprejudicial. The prosecutor does not deny that his conduct was intentional. (See App. Op. Br. p. 241.)

On page 93 appellee says it could properly ask Reyes about *his* broadcasts. *But what the prosecutor actually did was to ask about broadcasts which Reyes denied were his, and which were not otherwise shown to have been broadcast by him.* The contents of the supposed broadcasts were nevertheless before the jury and the judge gave no instructions to disregard. (App. Op. Br. p. 241.)

### 3. INCE.

At Br. page 93 appellee says:

“The Government’s reference to appellant as being Japanese was for the obvious purpose of distinguishing between the Japanese employees at Radio Tokyo and employees of other *nationality*.”

But the treason charge is predicated on the claim that appellant has *American* nationality. The only possible point in calling the defendant “Japanese” was to comment on her *race*.

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## XII. EXCLUSION OF DEFENSIVE MATERIAL. (Appellee’s Br. pp. 94-112.)

### A. DEFENDANT’S CITIZENSHIP.

Appellee anxiously tries to repudiate the action of every government department and every government official or employee outside the Department of Justice.

Obviously the acts of the Army, of Army guards who had custody of defendant, and all other government

officials acting within the scope of their duty (as they are presumed to do—"omnia praesumuntur rite acta") are acts of the United States government.

*As to defendant's citizenship, it is our position that the government muddled the subject so badly by contradictory orders and actions that the matter never can be shown beyond a reasonable doubt.*

Of course defendant "was not defending on the ground of Japanese citizenship". (Appellant's Br. p. 95.) It was up to the prosecution to prove defendant's American citizenship beyond a reasonable doubt, if possible. *Which means that it was up to the government to disentangle itself, if it could, from the web of oppressive and contradictory orders which it had woven regarding appellant's citizenship, beginning with defendant's Exhibit A, April 4, 1942.* This system of contradictory orders continued until after defendant's first arrest in Japan and the last orders were just as relevant as the earlier ones. If appellee claimed that the orders were based solely on events occurring later than August 13, 1945, it could show that if it wished. (Cf. Appellee's Br. pp. 94-5.) It did not do so.

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#### B. HARMLESS OR BENEFICIAL CHARACTER OF APPELLANT'S BROADCASTS.

Appellee says sweepingly "she cannot prove her intent by what some listeners thought about her broadcasts".

But obviously the reaction of listeners can *corroborate* her testimony that she had no intention to depress the spirits of the troops. Appellee returns to the rule that aid and comfort to the enemy need not succeed in its

mission. But that certainly cannot exclude the defense that no attempted aid and comfort was being offered to the enemy. And while lack of actual aid to the enemy is *not conclusive*, it is a *relevant factor* in determining whether the defendant actually wanted to give aid and comfort.

*This can be seen clearly if the circumstances are reversed. If a treasonable mission had a limited success, the prosecution would certainly feel there was a stronger case, and would certainly insist on proving the results of the mission. As said above: results are not indispensable, but their presence or absence is a relevant factor.*

At Br. page 98 appellee incorrectly states that no foundation was laid for secondary evidence in offering the testimony of Kamini Gupta. (App. Op. Br. pp. 201-2.) The witness testified that he had neither the bulletin nor access to it. (*K. Gupta*, XL-4559:15-18.) Furthermore, the government did not object that there was insufficient foundation for secondary evidence. (XL-4560:7-8.)

As to defendant's Exhibit BV for identification, appellee now claims that it waived only the authentication of the *copy*. (Appellee's Br. p. 99.) They cite *Ex parte Lamantia*, 206 Fed. 330, but that case deals with a statute, not a stipulation. Here the stipulation was definitely that the government waived objection to the authentication either of the copy or the original. The only objections which were *made* were that the document was "incompetent, irrelevant and immaterial, and hearsay". (L-5596:24-5597:2.)

Appellee also contends that the document contains conclusions. No objection was made on that ground; but in



any event the paper was offered as an admission and admissions are not subject to the opinion rule. See 4 *Wigmore on Evidence* (3rd ed.) sec. 1053(3) p. 15, citing, *inter alia*, *Calland Water Front Co. v. LeRoy*, 282 Fed. 385, 387 (CCA 9). And, of course, admissions are not hearsay.

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### C. DEFENDANT'S AID TO ALLIED PRISONERS.

(Appellee's Br. p. 100.)

Exhibit 47 was introduced to illustrate more general testimony that some Japanese were helping the allied prisoners. It is hard to see how it affects Cousens' credibility—on the other hand it is obviously intended to support the government's contention that helping the prisoners supposedly had nothing to do with one's attitude toward the war. (The government explicitly made that contention at XXIX-3274:14-22.) A showing that defendant was violating Japanese governmental regulations tends to show that she was not merely a well-disposed person, but was acting against the interests of the enemy. She was not giving the enemy aid and comfort.

Appellee insists that the questions to Ishii were correctly ruled out as improper cross-examination. But the Court made it clear that it considered the whole subject immaterial. It would have made no difference had we called Ishii as our own witness. The record adequately presents the issue of the materiality of the defense. (See App. Op. Br. pp. 210-211.)

#### D. EVIDENCE OF OTHER BROADCASTS.

The fact that appellee's witnesses said that "Time was not the main factor to them then" certainly does not preclude defendant from showing that at the times they named they must have been listening to a program other than hers. Certainly defendant was not limited to denying that she broadcast at any time other than 6-7 p.m. Tokyo time. She could corroborate her denial by showing that there were programs broadcast at that time which fitted the witnesses' testimony. The fact that these programs may have come from Japanese stations far outside of Tokyo does not make them immaterial. If the soldiers were not particular about time, they may not have been particular about their dialling on the receiving sets.

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#### E. RUMORS AS IMPEACHMENT.

Appellee cavalierly calls our argument "absurd" that we should be allowed to impeach the government witnesses by proving that they were living among so many rumors they could not remember fact from fancy. Then appellee talks about "hearsay thus sought to be elicited"—showing that counsel have missed the point entirely. "Hearsay" is an unsworn, uncross-examined extrajudicial statement *offered to prove the truth of its contents*. But *the rumors were not offered to prove the truth of their contents*. They were offered to show circumstances tending to impeach the accuracy and reliability of the government's witnesses. The reason why such evidence lessens a witness' reliability is shown by the quotation from *Moore on Facts* (App. Op. Br. pp. 212-213.)

On page 103 appellee seems to claim that because its witnesses testified positively the defendant should not be allowed to try to impeach them. But prosecution evidence does not exclude defense evidence—in fact the defendant's case consists precisely of an attempt to discredit the prosecution's evidence. And that is true no matter how “positively” the prosecution's witnesses may testify. Apart from that, Velasquez testified hearing defendant on Saturday or Sunday, *when she did not broadcast*, and at hours when she did not broadcast. (App. Op. Br. App'x. pp. 1-2.) Henschel claimed to have heard her between 10 and 12 p.m. (Tokyo time) when she did not broadcast. (App. Op. Br. App'x. p. 6.) (See Appellee's Br. p. 103.)

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#### F. FRAUDULENT GOVERNMENT SUBPOENAS.

Appellee says “several” subpoenas were introduced into evidence, and then cites *two*. Appellee also argues that the right to disobey an illegal subpoena is personal to the witness. But defendant was not trying to quash the subpoenas nor prevent any witness from testifying (as was done in the cases cited at the foot of Appellee's Br. p. 103). We offered the subpoenas to *show the fact of misrepresentation by the government to its witnesses*. This is fraud in the preparation of the case, and certainly admissible. And where it has been done in about 25 instances, admission of two subpoenas is inadequate to give a picture of all that occurred.

### G. ACTIVITIES OF BRUNDIDGE.

The evidence of Brundidge's agency was (a) that he went to Japan with Hogan at government expense on government business; (b) he participated with Hogan in interviewing defendant in Japan and getting her signature to Exhibit 15; (c) his passport stated that the object of his trip to Japan was official business for the Department of Justice. From the standpoint of ratification, it should be noted that the prosecutors put him on their witness list (Exhibit 1) long after they had knowledge of his attempts to suborn witnesses. (*Tillman* XVI-1597:17-1599:13.)

Of the authorities cited by appellee *Burton v. U. S.*, 175 F. (2d) 960 and *Hinks v. U. S.*, 179 Fed. (2d) 319 do not involve fraud *in the preparation of the case*, so they are not in point.

*Lau Fook Kau v. U. S.*, 34 F. (2d) 86 admitted a certain amount of testimony showing hostility between the defendant and the prosecutors. (34 F. (2d) 86, 91.) This Court merely ruled the trial Court correct in not letting the proof go further. *In the present case the proof was excluded almost entirely.*

*Lau Fook Kau v. U. S.* therefore supports the principle that bias, fraud, etc. may be shown against the government just as much as against a private litigant. So far as the case goes it supports appellant.

While 2 *Wigmore*, 3rd ed. sec. 280 says that mere *technical* agency is not enough, it also says, "no mere technical deficiencies of proof should be allowed to exonerate him; due regard to the common probabilities of experience should be paid."



Here Brundidge instigated the reopening of the prosecution; the government paid his plane fare to Japan; he worked hand in glove with government agents gathering "evidence"; government agents were expressly informed of his corrupt activities; he was not repudiated until less than three days before the trial started. (Exhibit 1—the witness list, containing his name, has to be served within three days of the beginning of the trial—18 U.S.C. 3432. It was not served sooner.) Wigmore even says (Vol. 2, p. 128):

"Why should B meddle in such fashion except upon some hint or order from the defendant [here—the prosecution]?"

Appellee also claims that Brundidge's passport (Ex. BR for identification) either was not offered or the offer withdrawn. The record shows that it was offered in evidence (L-5580:4-6), then the Court asked whether it was offered for identification and this was done. The admissibility of this line of evidence had been fully argued before the Court, although most of the argument is not reported. (XLI-4616.) Compare *Salt Lake City v. Smith*, 104 Fed. 457, 470 on the right to accept an earlier ruling of the trial Court without waiving the point on appeal. Besides, when the Court after objection asked whether the exhibit was offered for identification, he clearly indicated he was sustaining the objection. On this matter *there was enough evidence to require submitting the issue of agency to the jury.*

Appellee also tries to disparage the alternate ground of admissibility by saying that Lee did not use Brundidge's notes at the trial. (Br. p. 106.) Lee did not use Brundidge's notes *at the trial*, but he did say that he had

gotten his information from them. (*Lee* VIII-652:11-653:6.)

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## H-I. EVIDENCE ON DEFENDANT'S DIRECT TESTIMONY.

### 1. STATEMENT AT PRESS INTERVIEW THAT DEFENDANT'S VOICE WAS NOT THE ONE HEARD.

*Smith v. U. S.*, 47 F. (2d) 518, 520 (Appellee's Br. p. 107) says that to constitute part of the *res gestae* the statement must *usually* be spontaneous (not "always").

Appellee is wholly wrong in saying the statement must be at or near the time of the "offence" committed. *Res gestae* is not limited to reports of a *crime*. (See cases, App. Op. Br. p. 233.) Nor is it true that the statement here was not spontaneous. The correspondent heard defendant's voice in person for the first time, and immediately said it was not the voice he had heard over the radio.

### 2. CONVERSATIONS WITH BRUNDIDGE AFTER SIGNING EXHIBIT 15.

Appellee again misstates the record when it says the *excluded* conversation with Brundidge was about the state of appellant's health. (Appellee's Br. p. 107.) The *excluded* conversation was about a possible trial:

Def., XLVII-5224:19-22:

"A. I do not recollect whether I had any conversation with Mr. Brundidge while Mr. Hogan was present *about a trial*. *That had all been covered before Mr. Hogan returned*. I did not talk very much with Mr. Hogan."

Furthermore, since appellee even now insists on denial of offers of proof (Appellee's Br. p. 112) appellant must

be allowed to assign error without any showing of what the proof would have been.

This conversation with Brundidge is admissible on the foundation already noted that Brundidge was at least temporarily a government agent.

Statements made by Army officials and guards are, if anything, even more clearly admissions of the party opponent. (Appellee's Br. pp. 107-8.) As we said before, it is interesting to see how anxious the Department of Justice is to repudiate every other government department in this case. The same holds for the testimony offered through Pray. (Appellee's Br. pp. 108-9.)

### 3. EVIDENCE TO REBUT GOVERNMENT SHOWING ON "TOKYO ROSE".

Appellee says (Br. p. 109):

"The Government did not contend that appellant broadcast under the pseudonym 'Tokyo Rose' but only under the name 'Ann' or 'Orphan Ann'".

This sharpens the prejudicial effect of the Court's rulings on the subject. If the government did not contend that appellant broadcast under the name of "Tokyo Rose"—*why was the sobriquet brought into the evidence so often?* Why did the government insist on proving defendant's handwriting by the words "Tokyo Rose"? Why did it insist on introducing these words on the labels of Exhibits 16-21? (The records could just as well have been introduced without that notation.) What was the importance of Exhibit 14?

As we have already said, these items were intelligible only by reference to extrajudicial rumors, hearsay and folklore.

Popular American folklore during the war had made "Tokyo Rose" the great and mysterious woman broadcaster of any and every form of treasonable propaganda in the Pacific area. *Bringing this matter into the evidence was an unabashed appeal to sensationalism and prejudice right from the first day of the trial.*

Once it was in, the least defendant could do was try to answer the implied charge. Appellee says "the evidence excluded was rank hearsay". (Br. p. 109.) *But appellee itself had brought in all this hearsay by reference when it brought the term "Tokyo Rose" into the case through Exhibit 2 and later exhibits.*

It is always relevant to answer evidence which has been introduced by the opponent—at least where necessary to rebut unfair prejudice which would otherwise arise. *Bogk v. Gassert*, 149 U.S. 17, 25; *Meyers v. U. S.*, 147 F. (2d) 663, 667 (CCA-9—stating general rule); *McBoyle v. U. S.*, 43 F. (2d) 273, 275 (CCA-10); *Ball v. U. S.*, 147 Fed. 32, 40 (CCA-9); *Warren Live Stock Co. v. Farr*, 142 Fed. 116, 117 (CCA-8).

Moreover, we deny that the evidence which defendant offered was hearsay. The statements were not introduced as proof of their contents—but show *the fact that the name "Tokyo Rose" was in circulation before appellant began broadcasting.* From *this fact*, the inference follows that the expression referred to someone other than defendant.



## J. REPUTATION OF GOVERNMENT WITNESSES.

Appellee (Br. pp. 110-111) tries to justify the exclusion of Founmy Saisho's evidence as to Oki solely on the ground that the question asked for "reputation as to truth, honesty and integrity" rather than "reputation as to truth and veracity". We submit this is a purely verbal difference, and no justification for excluding the answer. (See generally *Knode v. Williamson*, 84 U.S. 556, 21 L.Ed. 670, 672, where a shorter form of the question was approved.) The questions as to Mitsushio and Ishii clearly referred to the same locale as that regarding Oki.

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## K. DENIAL OF OFFERS OF PROOF.

Appellee insists on the rulings preventing us from making offers of proof. (Br. p. 112.)

Rule Crim. Proc. 26 incorporates the common law by reference—which includes offers of proof. (See cases, App. Op. Br. pp. 90, 217.)

Appellee misstates *Meaney v. U. S.*, 112 F. (2d) 538, 539. The case merely said that offers of proof were not "an absolute prerequisite". But *Hoffman v. Palmer*, 129 F. (2d) 976, 994, also cited by appellee, shows how limited the exception is. Appellant could not afford to proceed without attempting to make offers of proof.

### XIII. LIMITATION OF CROSS-EXAMINATION OF PROSECUTION WITNESSES.

(Appellee's Br. pp. 113, 116.)

On page 113 appellee has a heading "Evidence offered through cross-examination". Anyone acquainted with the law of evidence would know this heading to be quite misleading. Cross-examining a witness as to his bias is not an "offer of evidence" (the cross-examiner does not even know what he is going to elicit. See generally, *Alford v. U. S.*, 282 U.S. 687, 692.) But since counsel for the government have throughout shown an astounding ignorance of the law of evidence, we do not here charge them with intentional misstatement.

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#### A. HENSCHEL.

We asked Henschel whether he had an opinion on the defendant's guilt or innocence. If he had, it would show bias. (It is not claimed he was in possession of all the facts.) If he believed her guilty it would show bias against her. Obviously we were not trying to show that he was biased in her favor but nevertheless testified against her. The question therefore came within the authorities cited in appellant's opening brief pages 223-4.

Appellee's cases on the opinion rule are wholly beside the point. The questions were not asked to bring an opinion before the jury as independent evidence, but to show the witness's *preconceived opinion* (i.e., bias) as *impeaching* his testimony. Here again we would be inclined to charge counsel with an intentional attempt to mislead if they had not shown such general ignorance of the law of evidence.

**B. LEE.****1. STATEMENTS IN LEE'S BOOK.**

Appellee argues that impeachment from Lee's book was properly ruled out as hearsay and opinion. We discussed the hearsay objection in appellant's opening brief pages 219-20. The opinion objection is now made for the first time. Impeachment is not subject to the opinion rule either. (*U. S. v. Holmes*, Fed. Cas. No. 15382, 26 Fed. Cas. 349, 356 (Clifford, Circuit Justice); *Ewing v. D. C.*, 135 Fed. (2d) 633, 642 (Rutledge as Circuit Judge); *Chicago & N.W. Ry. Co. v. De Clow*, 124 Fed. 142, 147.)

**2. OTHER MATTERS.**

The other points on limitation of Lee's cross-examination have already been adequately discussed either in our opening brief or this brief.

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**C. OTHER WITNESSES.**

The limitation of the cross-examination of Nii, Villarin and Hall is adequately covered in our opening brief.

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**XIV. REFUSAL TO PRODUCE STATEMENTS TAKEN FROM REYES.**

(Appellee's Br. pp. 117-121.)

By its citations on this phase of the case, appellee manages to confuse two entirely separate rules of evidence.

Tillman and Dunn were called by the prosecution in rebuttal to describe the process of taking Reyes' statements (Exhibit 52 and 54) and to testify whether these exhibits contained everything he told them.

On cross-examination we asked them whether they had taken any *other* statement in the course of interviewing Reyes. When it turned out that they had, we demanded the production of the document. The prosecutor refused and the judge sustained him, on the ground that the document was “*confidential*”.

To refuse on the ground that the document is supposedly “*confidential*” *assumes that it is otherwise admissible*.

Appellee, however, without making the distinction clear and without having made the objection below, now argues that the third statement was independently inadmissible (as well as that it was “*confidential*”).

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#### A. DOCUMENT OTHERWISE ADMISSIBLE—APPELLEE'S CASES NOT IN POINT.

The question whether the third statement of Reyes was admissible (apart from the issue of “*confidence*”) requires an analysis of appellee’s authorities and an analysis of the nature of the document.

##### 1. APPELLEE’S AUTHORITIES.

Appellee cites cases to the effect that a witness’s notes are not admissible unless he uses them in his testimony. But these all concern situations where the direct testimony dealt with other matters than the making of the documents themselves. In all of them the witness was called regarding some phase of the case on which he happened to have taken notes. It is held that he cannot be made to produce his notes *for the purpose of comparing them with his testimony*, unless he testified from them. In all



these cases, the opponent's desire to compare the notes with the testimony was the only connection between the testimony and the notes.

But in the present case *the taking of Reyes' statements was the subject of the direct examination*. The third statement was demanded, not as *notes on* the testimony, but as part of the *subject of* the testimony. In other words, it was demanded under the usual rule of cross-examination: that when part of a subject has been introduced on direct examination, the whole of it may be shown on cross. Here the prosecution offered evidence on the taking of statements from Reyes and introduced two documents; *a third one taken as part of the same interviews certainly is a proper part of the cross-examination*. It is introduced as *within the scope* of the direct; not as *notes upon* the direct.

## 2. NATURE OF THE THIRD STATEMENT.

Appellee denies the admissibility of the third statement of Reyes on the grounds (a) it apparently was not signed, (b) it was copied into a more extensive report and the original then destroyed.

a. The fact that Tillman and Dunn did not have Reyes sign the third statement is a relevant fact to be brought out on cross-examination. It certainly does not make the statement irrelevant where the direct examination dealt with the *process of taking the statements from Reyes*. Exhibits 52 and 54 were admittedly dictated to a stenographer mainly by Dunn. (*Tillman*, LI-5748:16-18, 5749:13-14, 5764:8-10—this last reference says Dunn dictated most of the statements.) Thus all three statements were in the language of the FBI agents. If the agents did not have

Reyes sign the third statement, it merely means that they did not proceed as far with that one as with the others.

It would be very significant if the FBI agents had Reyes sign only those matters which they thought favorable to the government, and left the rest unsigned. All this is clearly within the scope of legitimate cross-examination on the taking of Reyes' statements.

b. Nor does the third statement become any less admissible because it was copied into a larger report to the Attorney-General. If the statement was originally admissible, it does not become inadmissible because attached to other papers, or because a copy has been attached to other papers and the original destroyed.

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#### B. DOCUMENT NOT "CONFIDENTIAL".

Appellee cites no authorities on its original claim that the document was "confidential" except *Ex parte Sackett*, 74 F. (2d) 922, *Boske v. Commingore*, 177 U.S. 459 and *Hickman v. Taylor*, 329 U.S. 495. The first two are distinguished in the authorities which we cite, and held inapplicable to criminal cases. (See cases, App. Op. Br. pp. 229, 230; also discussion in *U. S. v. Coplon*, 185 F. (2d) 629, 638-9.) *Hickman v. Taylor* was a request for inspection of notes taken by an attorney interviewing witnesses. (The process of *interviewing* had not been offered as direct testimony by the side which took the interviews.)

This case holds that the papers of an attorney are *prima facie* confidential. *It does not even involve the question whether this confidence is waived where the side whom the attorney represented, itself puts on testimony*

*as to how these papers were made up. (Moreover, the confidence involved is the private attorney—client confidence, not the confidence of government documents.)*

Certainly, if the statements taken from Reyes were not otherwise confidential, they did not become confidential by reason of being delivered to the Department of Justice lawyers. Relevant documents cannot be suppressed by the simple device of handing them to one's lawyer; furthermore, *the FBI is not the client* of the government attorneys.

It goes against every principle of fair play to permit the government *to put on testimony as to how Reyes was interviewed* and then to exclude part of the relevant facts on cross-examination as "confidential".

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## **XV. MISCONDUCT OF THE PROSECUTOR.**

(Appellee's Br. pp. 87-8, 121-129.)

### **A. MISCONDUCT IN EXAMINING WITNESSES.**

(Appellee's Br. pp. 87-8.)

Appellee quotes the whole of the Supreme Court's summary in *Berger v. U. S.*, 295 U.S. 78-84. We omitted the sentence about "suggesting by his questions that statements had been made to him personally out of Court, in respect of which no proof had been offered". (See App. Op. Br. p. 179.) *We do not claim that this occurred.*

We also omitted the sentence about "pretending that a witness had said something which he had not said and persistently cross-examining the witness on that basis", but we now feel that we should have included it. Cf. cross-examination of Reyes, App. Op. Br. pp. 237-9. See, also,

the prosecutor's statement in cross-examining defendant regarding conversations with her husband (discussed above—see App. Op. Br. App'x pp. 50-51). The prosecutor said that Phil d'Aquino testified to this conversation on *direct* examination—which was not true and is not now claimed.

*As to the other assignments of misconduct in Berger v U. S., it is our position that they were repeated to the letter in the present case. We have already shown why the prosecutor had a weak case.*

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## B. MISCONDUCT IN ARGUMENT.

(Appellee's Br. pp. 121-29.)

### 1. SUGIYAMA'S TESTIMONY.

Appellee makes two special and one general argument to defend its distortion of Sugiyama's testimony.

a. First it says (Br. p. 122) that our objection and reading from the record cured the misstatements. That is obviously not true. In the first place, there is the weight which the U. S. attorney as an official, carries with the jury. See *Berger v. U. S.*, 295 U.S. 79, 88. In the second place, the Court did not give the instruction to disregard which we asked. *Declining the requested instruction disparages the request.*

b. Second, appellee says (p. 129) that the prosecutor "was not expected to quote the evidence verbatim". *But that is exactly what he did*—omitting only the sentence which made the first passage favorable to the defendant. *Such* misquotation is indefensible.

c. Third, it is claimed that the Court's inconclusive remarks telling the jury they were the judges of the evi-



dence, cured the misconduct. But similar indefinite instructions were held insufficient in *Taliaferro v. U. S.*, 47 F. (2d) 699, and *People v. Sanchez*, 35 Cal. (2d) 522, 530, 219 P. (2d) 9, 14. For the judge to tell the jury that they are the judges of the evidence decides nothing, and leaves open the inference that the prosecutor's misstatement may not have been a misstatement.

Appellee also says (Br. p. 123) that "no further request for other or different instructions on the point" was made. That is untrue. In the cases which appellee cites the "further request for other or different instructions" refers to the request for a specific instruction to disregard. *We did make that here.* (LIV-5940:17-22—it is true we omitted this reference in our opening brief.)

In the cases cited at appellee's brief, p. 123, there either was no request for an instruction to disregard, or the instruction was given.

## 2. EXHIBITS 52 AND 54.

Appellee claims that Exhibits 52 and 54 could be used as substantive evidence because Reyes supposedly said they were true. Reference is to XXXIII-3746, 3749 (Appellee's Br. p. 124). At 3746 he says merely that he gave "a statement \* \* \* which was true to the best of my knowledge and belief". There is no reference to either of the *two* Exhibits 52 and 54. At 3749 he is in effect *told* that he said all of 52 is true.

At Br. p. 124 appellee itself says that Reyes confirmed *most* (not all) of the exhibits.

He specifically *did not confirm* the denial of any agreement to sabotage the Japanese program. See p. 7, *supra*.

This circumstance destroys the basis for appellee's defense of the argument that Exhibit 52 "proves there was no sabotaging of the program". (Appellee's Br. p. 124.)

b. But there is a much broader reason why Exhibits 52 and 54 could not be used as substantive evidence.

Even if Reyes had said that all they contained was true, this would not automatically convert them into substantive evidence. *They were limited to impeachment at the time of admission and they were never reoffered as substantive evidence.* This is important, because Exhibit 52 in particular was *full of conclusions* which could not have gone in as substantive evidence over objection even if Reyes had said they were "true". *Almost the whole passage which the prosecutor read about Cousens consisted of conclusions.* (See App. Op. Br. pp. 196-7.)

This part of the exhibit was subject to objection if offered as substantive evidence; limited to impeachment, conclusions are admissible. (See p. 70, *supra*.) Consequently the exhibit was limited to impeachment, never reoffered as substantive evidence; then passages wholly inadmissible as substantive evidence were read as substantive evidence to the jury. That is clearly misconduct.

### 3. OVERT ACT 6.

a. Appellee says (Br. p. 125) that the second misstatement of evidence as to Overt Act 6 should not be considered because no separate objection was made to it. That is not true, because this second misstatement was a repetition of an earlier one as to which appellant had requested an instruction to disregard and the Court had

indicated its position by failing to give the instruction. Appellee tries to disguise this fact by discussing the second passage first. *Salt Lake City v. Smith*, 104 Fed. 457, 470, discusses this point with respect to rulings on evidence; we submit the same principle applies to objections during argument. Apart from that, the second passage is relevant in interpreting the first, to which proper exception *was* taken.

b. Appellee argues (Br. p. 126) that in the second passage the prosecutor was referring to *all* of appellant's testimony, not just to Overt Act 6. To do so it leaves off the first sentences (quoted App. Op. Br. p. 134 ft.):

“That was in October 1944. Overt Act 6.”

Furthermore, even in the part which appellee quotes, the prosecutor refers to “the voicing of *that broadcast*”.

Appellee finds it “difficult to perceive in what way the jury might have been misled”. But the record affirmatively shows that they were misled (App. Op. Br. p. 136) so speculation is beside the point.

#### 4. OTHER MISCONDUCT.

Appellee does not defend its other misconduct, except by attempting to belittle its effect.

At Br. 121 appellee notes that in our argument to the jury we said the prosecution was “unfair, unjust and downright crooked”. That referred to the attempt to make appellant retract her testimony about reestablishing citizenship, which testimony was proven true by Government's Exhibit 9. (I Arg. 118-19.) *We stand by our characterization.*

## XVI. INSTRUCTIONS. (Appellee's Br. pp. 129-39.)

### A. INSTRUCTIONS GIVEN.

1. To defend the instruction on motive appellee cites the fact that appellant intended to put on an entertainment, not a propaganda program. (Br. p. 130.) If appellant intended to put on entertainment solely, that goes to her intent, not merely to her motive. The rest of the matters mentioned on Appellee's Br. p. 130 do not, we submit, make out a defense which claims a good motive while admitting alleged treasonable intent.

2. *Appellee does not try to defend the instruction about the witnesses to Overt Act 6.* (Appellee's Br. pp. 131-2.) It merely says that other allegedly correct instructions cured it. But *first*, these other instructions were very general. In the second place, if they were correct and covered the specific point they would merely contradict the instruction regarding the witnesses to Overt Act 6. *Inconsistent instructions are reversible error.* *McFarland v. U. S.*, 174 F. (2d) 538, 539; *Thomas v. U. S.*, 151 F. (2d) 183, 187. Here the instructions are inconsistent on a vital point.

3. The instruction on citizenship ignored the evidence showing the government's doubts about appellant's citizenship. No other instruction made up this lack.

We have already discussed the point involved in the instruction on lack of pro-Japanese results (*supra*, pp. 58-9).



## B. INSTRUCTIONS REFUSED.

### 1. INSTRUCTION ON CORPUS DELICTI.

Appellee says this instruction was too broad, in that admissions made before the commission of the alleged offense need not be corroborated. But even if this were true, it would not justify a complete failure to instruct upon the issue. Instruction 30A was refused and no other given. Even if 30A was incorrect, it called the Court's attention to the issue. It is the rule in the Ninth Circuit, at least, that under these circumstances a complete failure to instruct on an issue is error. *Freihage v. U. S.*, 56 F. (2d) 127, 133; *Armstrong v. U. S.*, 41 F. (2d) 162, 163.

The cases cited (see page 135 of appellee's brief) either hold that the instructions were incorrect (*George v. U. S.*, 125 F. (2d) 559; *Murray v. U. S.*, 288 Fed. 1008) or that the defendant conceded the alleged admissions. (*Daeche v. U. S.*, 250 Fed. 566.) Here defendant denied many of the alleged admissions. At page 157 appellee says that defendant "did not point out to the Court wherein she had raised the issue or controverted the voluntary character of any particular statement attributed to her". Our objections were certainly in the record, and the Court may be assumed to have been aware of them. We do not believe that the rule requiring exceptions to the proposed charge requires restating objections to evidence which occurred as often as our objection to the voluntariness of appellant's alleged confessions.

Our exception has been corrected by written stipulation to read that each instruction "states the correct law *and* is applicable to the evidence and not covered by other instructions".

At page 138 appellee misstates the record in saying that we did not raise the issue of voluntariness at the trial. It is true our opening brief omitted the references, but the objections had been made. (See pages 1-2, this brief.)

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### **XVII. CONCLUSION.**

The conclusions of our opening brief stand. The judgment should be reversed as there indicated.

Dated, San Francisco, California,

February 7, 1951.

Respectfully submitted,

WAYNE M. COLLINS,

GEORGE OLSHAUSEN,

THEODORE TAMBA,

MARVEL SHORE,

*Attorneys for Appellant.*

**(Appendix Follows.)**



## **Appendix.**





## Appendix

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(p. 7)

XXXIII-3785:7-13:

“Q. Did you not tell Special Agents Dunn and Tillman on 2 October, 1948, at the offices of the Federal Bureau of Investigation, U. S. Department of Justice, Federal Office Building, San Francisco, California, that the only agreement between you and Ince and Cousens was the one to plead duress after the war so that nothing would happen to either you or Cousens or Ince? Did you say that in substance?”

XXXIII-3786:1-3:

“A. I can't remember clearly whether I made that statement or not.

Q. You probably did make it orally to them, didn't you?”

XXXIII-3786:9-3787:24:

“A. I don't remember if I did.

Mr. DeWolfe. Q. You may have?

Mr. Collins. I object to that on the ground it is asking for an opinion and conclusion, argumentative.

The Court. The question has been asked and answered. Objection sustained.

Mr. DeWolfe. Q. You will not say you did not make such a statement, will you, Reyes?

Mr. Collins. I object to that on the ground it has been asked and answered.

The Court. The objection is overruled. He may answer. Do you understand the question?

Read it.

(Question read.)

The Witness. And the statement was, please?

Mr. DeWolfe. Q. That you and Ince and Cousens only had an agreement to plead duress after the war so that nothing would happen to you three, and that that was the only agreement between you? In substance, did you so state orally to the agents on that date?

A. Yes, I remember.

Q. Did you make that statement, Reyes?

Mr. Collins. Just a moment. The witness is starting to answer the question.

Mr. DeWolfe. Q. I ask you to answer that yes or no.

A. My answer was yes, Mr. DeWolfe. May I continue?

Mr. DeWolfe. Q. Your answer is yes, you made such a statement?

A. Yes. Yes, I was asked if I could remember the exact date and the persons present on any such agreements to tamper with the broadcasts at Radio Tokyo, and at that time I could not, and this was one particular conversation I could remember. I do not remember saying that this was the only agreement we ever reached in Radio Tokyo.

Q. But you did make that statement that I have just asked you about, is that correct?

A. Yes, I did.

Q. *And, of course, that statement that you made to them was true, wasn't it, Norman? This statement I am just asking you about that you said you made was true, wasn't it?*

A. *No, it was not.*

(p. 9)

Cowan, XXVI-2824:23-2826:2:

“Q. Will you tell me by whose instructions or orders the film was taken or made?

A. Yes, the arrangements were originally made by Lieutenant Jack Kaduson. *The approval came from the assignment officers of GHQ*, plus our immediate commanding officer.”

XXVI-2827:2-24:

“Q. And the defendant's voice was actually put on the sound track of that film?

A. Absolutely.

Q. But she did read from some script, didn't she, in the making of that sound track?

A. That's correct.

Q. Where was the script obtained if you know?

A. It was a compilation written by Lt. Kaduson who happened to be assigned to our unit at that particular time as a writer-director.

Q. Was that script written up by him from radio script that had been obtained from the defendant?

A. A large portion, except those parts which were strictly imaginary.

Q. Yes. Now, where is the radio script that was used to compile the script that was read into the sound track of that film?

A. That is quite complicated. To the best of my knowledge, I don't know.

Q. You don't know. But there were a good many pages of radio script that were used by Lt. Kaduson in



rewriting the script that was used on that sound track, isn't that true?

A. Lt. Kadusen used many original scripts in helping give him leads toward building a script."

(p. 9)

VIII-634:15-20:

"Q. Mr. Brundidge was talking to the defendant alone in that room on occasions during your 40 to 45 interview, is that true?

A. Not alone. As I stated before, at the beginning, while I was talking to the receptionist, Mr. Brundidge had possibly a minute or two talking with the defendant. *We were in the same room, but I couldn't hear what they were saying.*"

(p. 40)

*R. I. Recreation Center v. Aetna Casualty Co.*, 177

F. (2d) 603, 605-6:

"He was left free while he was in the building to communicate his plight to the employee who had let him in, or to one or both of the other night workers there, and to enlist their aid and *he was free to telephone the police himself*, and \* \* \* *there was ample time for the police to provide him with protection.* \* \* \* there is no basis for the assumption that the police of Providence or Pawtucket \* \* \* would be unable to afford adequate protection against any revenge which persons of that ilk, or even 'gangsters' would be likely to attempt or accomplish."

No. 12387

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United States  
Court of Appeals  
for the Ninth Circuit.

---

RALPH CASEY, EDWARD PLESA and  
GEORGE LaCLAIR,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
Western District of Washington  
Northern Division.

FILED

OCT 1 1950

PAUL P. O'BRIEN,

CLERK



No. 12387

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United States  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Appellee.

United States District Court, Western District of  
Washington, Northern Division

No. 47792

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RALPH CASEY, EDWARD PLESA and  
GEORGE La CLAIR,

Defendants.

### INDICTMENT

The Grand Jury charges:

#### Count I.

That on or about February 7, 1949, at Seattle, in the Northern Division of the Western District of Washington, Ralph Casey, Edward Plesa, and George La Clair, and each of them did unlawfully, wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio without a station license having first been granted by the Federal Communications Commission in accordance with Section 301, Title 47, United States Code, authorizing the use and operation of certain apparatus used and operated by the said defendants as aforesaid, and that said defendants did unlawfully, wilfully and knowingly by the use and operation of the apparatus aforesaid transmit energy, communications

and signals by radio from one place in the State of Washington, to wit, Seattle, to a place in another state, to wit, Portland, Oregon.

All in violation of Section 301, Title 47, United States Code.

### Count II.

That on or about February 5, 1949, at Seattle, in the Northern Division of the Western District of Washington, Ralph Casey, Edward Plesa and George La Clair and each of them did unlawfully, wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio without a station license having first been granted by the Federal Communications Commission in accordance with Section 301, Title 47, United States Code, authorizing the use and operation of certain apparatus used and operated by the said defendants as aforesaid, and that said defendants did unlawfully, wilfully, and knowingly by the use and operation of the apparatus aforesaid transmit energy, communications and signals by radio from one place in the State of Washington, to wit, Seattle, to a vessel sailing upon the navigable waters of the United States, to wit, Puget Sound.

All in violation of Section 301, Title 47, United States Code.

### Count III.

That on or about February 10, 1949, at Seattle, in the Northern Division of the Western District



of Washington, Ralph Casey, Edward Plesa and George La Clair and each of them did unlawfully, wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio without a station license having first been granted by the Federal Communications Commission in accordance with Section 301, Title 47, United States Code, authorizing the use and operation of certain apparatus used and operated by the said defendants as aforesaid, and that defendants did unlawfully, wilfully and knowingly by the use and operation of the apparatus aforesaid transmit energy, communications and signals by radio from one place within the State of Washington, to wit, Seattle, to other places within the State of Washington and the effects of such use and operation extended beyond the borders of the said State of Washington, and caused interference with the transmission of energy, communications and signals from places in other states to places within the State of Washington.

All in violation of Section 301, Title 47, United States Code.

#### Count IV.

That on or about February 7, 1949, at Seattle, in the Northern Division of the Western District of Washington, Ralph Casey, Edward Plesa and George La Clair and each of them did unlawfully, wilfully and knowingly use and operate certain apparatus for the transmission of energy, communi-

cations and signals by radio from one place within the State of Washington, to wit, Seattle, to a place in another state, to wit, Portland, Oregon, without a radio operator's license having first been issued by the Federal Communications Commission to said defendants in accordance with Section 318 of Title 47, United States Code, the said certain apparatus used and operated by the said defendants, being then and there set up as a radio station of the style and type for which a radio station license is required.

All in violation of Section 318, Title 47, United States Code.

#### Count V.

That on or about February 5, 1949, at Seattle, in the Northern Division of the Western District of Washington, Ralph Casey, Edward Plesa and George La Clair and each of them did unlawfully, wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio from one place within the State of Washington, to wit, Seattle, to a vessel sailing upon the navigable waters of the United States, to wit, Puget Sound, without a radio operator's license having first been issued by the Federal Communications Commission to said defendants in accordance with Section 318 of Title 47, United States Code, the said certain apparatus used and operated by the said defendants being then and there set up as a radio station of the style and type for which a radio station license is required.

All in violation of Section 318, Title 47, United States Code.

Count VI.

That on or about February 10, 1949, at Seattle, in the Northern Division of the Western District of Washington, Ralph Casey, Edward Plesa and George La Clair and each of them did unlawfully, wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio from one place within the State of Washington, to wit, Seattle, to other places within the State of Washington and the effects of such use and operation extended beyond the borders of the said State of Washington and caused interference with the transmission of energy, communications and signals from places in other states to places within the State of Washington, without a radio operator's license having first been issued by the Federal Communications Commission to said defendants in accordance with Section 318 of Title 47, United States Code, the said certain apparatus used and operated by the said defendants being then and there set up as a radio station of the style and type for which a radio station license is required.

All in violation of Section 318, Title 47, United States Code.

Count VII.

That Ralph Casey, Edward Plesa and George La Clair and each of them beginning on or about

January 23, 1949, at Olympia, Washington, and continuing thereafter until on or about February 10, 1949, at Seattle, Washington, in the Northern Division of the Western District of Washington did then and there knowingly, wilfully and unlawfully combine, conspire, confederate and agree together, and with each other, and together with sundry and diverse other persons to the grand jurors unknown, to commit certain offenses against the United States of America, that is to say:

To knowingly, wilfully, and unlawfully use and operate certain apparatus for the transmission of energy, communications and signals by radio without a station license having first been granted by the Federal Communications Commission in accordance with Section 301, Title 47, United States Code, authorizing the use and operation of said certain apparatus and to knowingly, wilfully, and unlawfully, by the use and operation of the apparatus aforesaid, transmit energy, communications and signals by radio from one place within the State of Washington, to wit, Seattle, Washington, to a place in another state, to wit, Portland, Oregon, and to a vessel sailing upon the navigable waters of the United States, to wit, Puget Sound, and to other places within the State of Washington, the effects of such use and operation extending beyond the borders of the said State of Washington and causing interference to the transmission of energy, communications, and signals from places in other states to places within the State of Washington, all



in violation of Section 301, Title 47, United States Code.

To knowingly, wilfully, and unlawfully use and operate the said certain apparatus for the transmission of energy, communications and signals by radio from and to the places aforesaid without a radio operator's license first having been issued by the Federal Communications Commission to said defendants in accordance with Section 318, Title 47, United States Code, the said certain apparatus being set up as a radio station of the style and type for which a radio station license is required, all in violation of Section 318, Title 47, United States Code.

### Overt Acts

That, after the formation of the aforesaid conspiracy and in pursuance thereof, and in order to effect the object of the aforesaid conspiracy and for the purpose of executing said unlawful conspiracy and agreement, the hereinafter parties did certain overt acts, that is to say,

1. On January 23, 1949, Ralph Casey and George La Clair transported the aforesaid radio apparatus, consisting of transmitter, power supply, and associated equipment, together with receiving equipment designed to be worn concealed on the body and utilizing a hearing aid ear piece as an earphone to the Governor Hotel, Olympia, Washington, and on January 24 said defendants together with Edward Plesa transported the said equipment from said hotel.



2. On January 24, 1949, Ralph Casey, Edward Plesa and George La Clair transported the afore-said radio apparatus to the Olympian Hotel and on January 25 said defendants transported the said equipment from said hotel.

3. On January 25, 1949, Ralph Casey, Edward Plesa and George La Clair transported the said radio apparatus to the Winthrop Hotel, Tacoma, Washington, and on January 26, 1949, transported said apparatus from said hotel.

4. On January 28, 1949, Ralph Casey, Edward Plesa and George La Clair transported said radio apparatus to the Olympian Hotel, Olympia, Washington.

5. On January 29, 1949, Ralph Casey, Edward Plesa and George La Clair operated the said radio apparatus at Olympia, Washington, and at that time broadcast the running of the horse race in progress at Hialeah Race Track, Miami, Florida, and broadcast the results of said race.

6. On January 30, 1949, Ralph Casey, Edward Plesa and George La Clair transported said radio apparatus to Benjamin Franklin Hotel, Seattle, Washington.

7. On February 2, 1949, Edward Plesa and Ralph Casey obtained a room at the Stratford Hotel, Seattle, Washington, for the purpose of using the radio apparatus therein.

8. On February 2 and 3, 1949, Edward Plesa,

Ralph Casey and George La Clair operated the said radio apparatus at Seattle, Washington, and broadcast the horse races in progress at Santa Anita, California, and broadcast the results of said races.

9. On February 4, 1949, Edward Plesa, Ralph Casey and George La Clair tested the said radio apparatus from the Stratford Hotel, Seattle, Washington, by broadcasting test signals.

10. On February 4, 1949, Edward Plesa, Ralph Casey and George La Clair operated the said radio apparatus from the Stratford Hotel, Seattle, Washington, and broadcast the horse races in progress at Santa Anita, California, and broadcast the results thereof.

11. On February 5, 1949, Ralph Casey obtained a room at the Arlington Hotel, Seattle, Washington, for purposes of using the radio apparatus therein, registering in said hotel as R. B. Hurly.

12. On February 5, 1949, Edward Plesa, Ralph Casey and George La Clair transported said radio apparatus to Arlington Hotel, Seattle, Washington.

13. On February 5, 1949, Edward Plesa, Ralph Casey and George La Clair tested the said radio apparatus from the Arlington Hotel, Seattle, Washington, by broadcasting testing signals.

14. On February 5, 1949, Edward Plesa, Ralph Casey and George La Clair operated the said radio apparatus from the Arlington Hotel, Seattle, Wash-

ington, and broadcast the horse races in progress at Santa Anita, California, and the results thereof.

15. That on February 7, 1949, Edward Plesa, Ralph Casey and George La Clair obtained a suite of rooms at the Benjamin Franklin Hotel for the purpose of using the radio apparatus therein, and transported the said radio apparatus to said quarters.

16. That on February 7, 1949, Ralph Casey and Edward Plesa concealed on their bodies radio receivers using a hearing aid ear piece for an earphone and, thus equipped in that manner, assisted in the testing of the aforesaid radio transmitter by checking testing signals broadcast over said apparatus by George La Clair and by carrying out instructions and directions broadcast by George La Clair over said apparatus.

17. That on February 7, 1949, George La Clair operated the said radio transmitting apparatus from the Benjamin Franklin Hotel and broadcast testing signals and instructions and directions as aforesaid.

18. That on February 9 and 10, 1949, Edward Plesa, Ralph Casey and George La Clair operated the said radio apparatus from the Benjamin Franklin Hotel, Seattle, Washington, broadcasting testing signals and the running of the horse races in progress at Hialeah, Miami, Florida, at the Fairgrounds, New Orleans, Louisiana, and at Santa Anita, California, and the results of said races.

All in violation of Section 371, Title 18, United States Code.

A True Bill.

/s/ THOMAS H. OLM,  
Foreman.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ VAUGHN E. EVANS,  
Assistant United States  
Attorney.

[Endorsed]: Filed February 17, 1949

---

[Title of District Court and Cause.]

MOTION TO SUPPRESS EVIDENCE  
AND RETURN SEIZED ARTICLES

Comes Now the defendant, George La Clair, by his attorney of record, Allan Pomeroy, and moves the Court to enter an order suppressing as evidence and directing the return to this defendant of the radio equipment and other articles seized from his Packard automobile. This motion is based on the records and files herein and the attached affidavit.

/s/ ALLAN POMEROY,  
Attorney for Defendants.

[Title of District Court and Cause.]

AFFIDAVIT OF DEFENDANT  
GEORGE LaCLAIR

State of Washington,  
County of King—ss.

George LaClair, being first duly sworn on oath, deposes and says: That he is one of the defendants in the above-entitled action and that he makes this affidavit in support of his motion to suppress evidence herein; that for a considerable period of time prior to the arrest of this defendant and the other defendants herein, they had been under surveillance by federal officers, who were listening outside the rooms occupied by the defendants in the Benjamin Franklin Hotel in Seattle;

That on the day this defendant and the others were arrested they were in their rooms at the Benjamin Franklin Hotel, in Seattle, Washington, and were arrested by several federal officers, who had with them warrants for the arrest of the defendants; that subsequent to said arrest the officers made a search of the rooms occupied by the defendants, opening drawers in the dressers and looking through the wastebaskets. At or about the same time Seattle police officers, working in conjunction with the federal officers, seized and searched affiant's automobile which was parked in a garage separate from and at a distance from the said hotel and took from said automobile some radio equipment and other articles. That said search and seizure was



against the wishes of affiant and the other defendants.

/s/ GEORGE LaCLAIR.

Subscribed and sworn to before me this 16th day of August, 1949.

/s/ MARIAN M. PARKS,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 18, 1949.

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[Title of District Court and Cause.]

Comes Now the plaintiff, United States of America, and furnishes herewith affidavits of

Herbert H. Arlowe,  
Everett K. Ames,  
Edward C. Scully,

in opposition to the defendant George LaClair's Motion to Suppress Evidence.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ JOHN F. DORE,  
Asst. United States Attorney.

## AFFIDAVIT OF EDWARD C. SCULLY

United States of America,  
Western District of Washington,  
Northern Division—ss.

Edward C. Scully, being first duly sworn, on oath deposes and says:

That I am a Deputy United States Marshal for the Western District of Washington, and that I was so employed on or about February 10, 1949. On that day I was on duty in the United States Marshal's Office in the Federal Court House, Seattle, Washington, when a Mr. Herbert H. Arlowe of the Federal Communications Commission came in to secure the arrest of Ralph Casey, Edward Plesa and George LaClair, who were suspected of operating an unlicensed radio station in the Benjamin Franklin Hotel in Seattle. After waiting some time to see the United States Commissioner, Mr. Arlowe and I finally secured warrants of arrest and proceeded to the Benjamin Franklin Hotel. I thought that the suspects were probably in the lobby of the hotel but I did not see them there and asked Mr. Arlowe "where are they at?" and Mr. Arlowe told me that they were last in room 1217 before he left the hotel to secure the warrants. We then proceeded upstairs to the designated room and I knocked on the door. The door was opened by Mr. Casey and I announced who I was and the purpose of my mission. Casey identified himself and I served the warrant upon him, and Mr. Plesa then identified himself and I served the warrant upon him, stating that both he

and Mr. Casey were under arrest. Mr. Plesa then asked me "What are we to do about this?" and I told him that they would have to come with me and put up bond or go to jail. I then was anxious to discover the whereabouts of Mr. LaClair, and there being several other people in the room, I said that if I could not find Mr. LaClair that it would be necessary for me to take everyone in the room to jail. It was then that Mr. LaClair stepped forward and identified himself and I served the warrant of arrest upon him. I then left the hotel together with these men and took them to the United States Marshal's Office in the Federal Court House.

I never saw the Packard automobile belonging to Mr. LaClair nor did I at any time search it.

/s/ EDWARD C. SCULLY.

Subscribed and sworn to before me, this 25th day of August, 1949.

[Seal] /s/ MILLARD P. THOMAS,  
Clerk, United States District Court, Western District of Washington.

## AFFIDAVIT OF HERBERT H. ARLOWE

United States of America,  
Western District of Washington,  
Northern Division—ss.

Herbert H. Arlowe, being first duly sworn, on oath deposes and says:

That he is the Engineer in Charge of the Federal Communications Commission; that he investigated the case of the United States vs. Ralph Casey, Edward Plesa and George LaClair; that on or about February 10, 1949, he obtained three warrants for the arrest of the three above-named defendants from the United States Commissioner; that prior to obtaining these warrants he, along with the other investigators of this department, had been investigating the activities of some operators who were operating an unlicensed radio station. Upon investigation we located the operations as taking place in the Benjamin Franklin Hotel, and after considerable investigation, and by various means at our disposal, ascertained that the unlicensed equipment was being operated in room 1217 of the Benjamin Franklin Hotel. As I stated before, along with some other assistants, we located the operation as being from room 1217, the room of the defendants. We could hear voices within the room testing the apparatus of the radio paraphernalia and then departed for the United States Commissioner's office to obtain a warrant for the arrest of the occupants of that room. There was some little delay of approximately thirty minutes in wait-

ing for the Commissioner. However, after he arrived we obtained the warrants and proceeded back to the hotel with Deputy Marshal Edward C. Scully for the purpose of arresting Ralph Casey, Edward Plesa and George LaClair. After arriving at the hotel Marshal Scully proceeded to the room and arrested these three men and removed them from the hotel. Before Deputy Marshal Scully took the men from the hotel room I searched the room for the unlicensed radio transmitter, and not finding it there or any other radio equipment, I called my office and was advised that the hotel manager had called and reported that the baggage had been taken down to LaClair's Packard car at the Motor Ramp Garage. I then proceeded immediately to the car and the attendant unlocked the back of the car at our request and Mr. Ames and the attendant removed the two pieces of luggage found there. We opened these pieces of luggage and found an unlicensed radio transmitter and associated equipment including a very small radio receiver, capable of being concealed under the user's clothing, together with a hearing-aid phone attached to it. This search of the car was made a couple of minutes after and incident to the arrest for the purpose of obtaining the equipment used.

Mr. Donofrio was present at the time of the search and did not object. He said that he had been sent to get Mr. LaClair's car. I would say that it took us about two minutes to proceed from room 1217 to the Motor Ramp Garage where we searched the car incident to the arrest. Mr. Standard, the



assistant manager of the hotel, had held the garage claim stub as a security for the payment owed by Casey and the others on the room because a big bill had been run up. Mr. Donofrio did not have the stub when he went to get the Packard. Mr. Ames had already located the luggage so that was the reason we proceeded to the Ramp Garage to search the Packard.

/s/ HERBERT H. ARLOWE.

Subscribed and sworn to before me, this 25th day of August, 1949.

[Seal]     /s/ MILLARD P. THOMAS,  
Clerk, United States District Court, Western District of Washington.

### AFFIDAVIT OF EVERETT K. AMES

United States of America,  
Western District of Washington,  
Northern Division—ss.

Everett K. Ames, being first duly sworn, on oath deposes and says:

That I am a Radio Engineer for the Federal Communications Commission; that on or about February 10 of this year I was working on the investigation of the operations of an unlicensed radio station in the city of Seattle. I worked in conjunction with Engineer in Charge Herbert H. Arlowe and Radio Engineer Joseph Hallock. On February 10, 1949, after exhaustive investigation, we finally

located the operation of the equipment in room 1217 of the Benjamin Franklin Hotel. After definitely locating the place of operation in room 1217 and hearing certain voices testing the equipment in that room, we decided to obtain a warrant for the arrest of the occupants of the room. Mr. Arlowe left and went for the warrants. Mr. Hallock and I decided to leave the hotel because we believed that we had already been observed by one of the suspects, so we went back to the office. Shortly thereafter the office received a telephone call from Mr. Standard, assistant manager of the Benjamin Franklin Hotel, reporting that the occupants of room 1217, Ralph Casey, Edward Plesa and George LaClair, were checking out and that they had ordered their baggage taken to their Packard automobile located in the Motor Ramp Garage at 6th Avenue and Westlake. This garage is located a short distance southeast of the hotel. After we received the message Mr. Hallock and I proceeded immediately to the Motor Ramp Garage. There we talked to an attendant and discovered that he had the keys to the Packard automobile belonging to Mr. LaClair. I then went with the attendant to the car and the attendant opened the back trunk of the car and in the trunk we observed certain luggage containing a transmitter and receiver. We did not remove it from the car, but after looking at it we again locked the car and went up to wait for the owner of the car to arrive. While waiting we decided to call the City Police and have them present in case any disturbance took place. They did not search the car but merely stood by at

a distance. I subsequently left the garage and proceeded to room 1217 of the hotel. The arrest had already been made and the defendants were still in the room when I arrived. I then returned to the garage with Mr. Arlowe. I asked the attendant to unlock the car and together we removed the two pieces of luggage and found an unlicensed radio transmitter, power supply microphone and associated equipment.

/s/ EVERETT K. AMES.

Subscribed and sworn to before me, this 25th day of August, 1949.

[Seal]      /s/ MILLARD P. THOMAS,  
Clerk, United States District Court, Western District of Washington.

Receipt of Copy acknowledge.

[Endorsed]:    Filed August 25, 1949.

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[Title of District Court and Cause.]

### VERDICT

We, the jury in the above-entitled cause, find the defendant, Ralph Casey is guilty as charged in Count I of the Indictment; and further find the defendant, Ralph Casey is guilty as charged in Count II of the Indictment; and further find the defendant, Ralph Casey is guilty as charged in Count III of the Indictment; and further find the defendant

Ralph Casey is guilty as charged in Count IV of the Indictment; and further find the defendant, Ralph Casey is guilty as charged in Count V of the Indictment; and further find the defendant, Ralph Casey is guilty as charged in Count VI of the Indictment; and further find the defendant, Ralph Casey not guilty as charged in Count VII of the Indictment;

and further find the defendant, Edward Plesa is guilty as charged in Count I of the Indictment; and further find the defendant, Edward Plesa is guilty as charged in Count II of the Indictment; and further find the defendant, Edward Plesa is guilty as charged in Count III of the Indictment; and further find the defendant, Edward Plesa is guilty as charged in Count IV of the Indictment; and further find the defendant, Edward Plesa is guilty as charged in Count V of the Indictment; and further find the defendant, Edward Plesa is guilty as charged in Count VI of the Indictment; and further find the defendant, Edward Plesa not guilty as charged in Count VII of the Indictment;

and further find the defendant, George LaClair is guilty as charged in Count I of the Indictment; and further find the defendant, George LaClair is guilty as charged in Count II of the Indictment; and further find the defendant, George LaClair is guilty as charged in Count III of the Indictment; and further find the defendant, George LaClair is guilty as charged in Count IV of the Indictment; and further find the defendant, George LaClair is guilty as

charged in Count V of the Indictment; and further find the defendant, George LaClair, is guilty as charged in Count VI of the Indictment; and further find the defendant, George LaClair not guilty as charged in Count VII of the Indictment.

/s/ KIRBY SPEYER,  
Foreman.

[Endorsed]: Filed September 6, 1949.

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[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Come Now the defendants herein, Ralph Casey, Edward Plesa, and George LaClaire, by their attorneys of record and respectfully move the court to grant them a new trial for the following reasons:

1. The court erred in failing to suppress plaintiff's exhibits 5 and 6 and in admitting them into evidence over defendants' objection.
2. The court erred in admitting testimony as to tests made by the government of plaintiff's exhibits 5 and 6 over defendants' objection.
3. The court erred in admitting evidence on behalf of the plaintiff as to the existence, contents, substance, purport, effect and meaning of intercepted radio communications allegedly transmitted by the defendants, said evidence being admitted over the objection of defendants.
4. The court erred in failing to grant defend-



ants' motion to strike all testimony introduced on behalf of the plaintiff as to the existence, contents, substance, purport, effect, and meaning of intercepted communication allegedly transmitted by the defendants.

/s/ ALLAN POMEROY,

/s/ ROBERT C. ROYCE,

Attorneys for Defendants.

[Endorsed]: Filed September 10, 1949.

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United States District Court, Western District of  
Washington, Northern Division

No. 47792

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RALPH CASEY,

Defendant.

### JUDGMENT, SENTENCE AND COMMITMENT

On this 12th day of September, 1949, the attorney for the Government, and the defendant, Ralph Casey, appearing in person and being represented by Allan Pomeroy, his attorney, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given the defendant and the defendant entered a plea of not guilty and a trial was

held, resulting in a verdict of guilty as to Counts I, II, III, IV, V and VI thereof; that by order of this Court the presentence investigation was dispensed with; now, therefore.

It Is Adjudged that the defendant, Ralph Casey, has been convicted by jury verdict and is guilty and is convicted of the offense of violation of Sections 301 and 318, Title 47, U. S. C., as charged in Counts I, II, III, IV, V and VI of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged and Ordered that the defendant, Ralph Casey, on Count I of the Indictment, be committed to the custody of the Attorney General of the United States for confinement in the Federal Prison Camp at McNeil Island, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Seven Months.

It Is Further Adjudged and Ordered that the defendant, Ralph Casey, shall pay a fine to the United States of America in the sum of One Dollar on each of Counts II, III, IV, V and VI of the Indictment, and shall stand committed until such fines are paid.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or

other qualified officer, and that said copy serve as the commitment of the defendant.

Done in Open Court this 12th ay of September, 1949.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ JOHN F. DORE,

Asst. United States Attorney.

Violation of Federal Communications Act.

[Endorsed]: Filed September 12, 1949.

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United States District Court, Western District of  
Washington, Northern Division

No. 47792

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE LaCLAIR,

Defendant.

### JUDGMENT, SENTENCE AND COMMITMENT

On this 12th day of September, 1949, the attorney for the Government, and the defendant, George LaClair, appearing in person and being represented by Allan Pomroy, his attorney, the Court finds the following:

That prior to the entry of his plea, a copy of the

Indictment was given the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Counts I, II, III, IV, V and VI thereof; that by order of this Court the presentence investigation was dispensed with; now, therefore,

It Is Adjudged that the defendant, George LaClair, has been convicted by jury verdict and is guilty and is convicted of the offense of violation of Sections 301 and 318, Title 47, U. S. C., as charged in Counts I, II, III, IV, V and VI of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged and Ordered that the defendant, George LaClair, on Count I of the Indictment, be committed to the custody of the Attorney General of the United States for confinement in the Federal Prison Camp at McNeil Island, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Seven Months.

It Is Further Adjudged and Ordered that the defendant, George LaClair, shall pay a fine to the United States of America in the sum of One Dollar on each of Counts II, III, IV, V and VI of the Indictment, and shall stand committed until such fines are paid.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done In Open Court this 12th day of September, 1949.

/s/ JOHN C. BOWEN,  
United States District Judge.

Presented by:

/s/ JOHN F. DORE,  
Asst. United States Attorney.

Violation of Federal Communications Act.

[Endorsed]: Filed September 12, 1949.

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United States District Court, Western District of  
Washington, Northern Division

No. 47792

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

EDWARD PLESA,  
Defendant.

### JUDGMENT, SENTENCE AND COMMITMENT

On this 12th day of September, 1949, the attorney for the Government, and the defendant, Edward Plesa, appearing in person and being represented



by Alan Pomeroy, his attorney, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Counts I, II, III, IV, V, and VI thereof; that by order of this Court the presentence investigation was dispensed with; now, therefore,

It Is Adjudged that the defendant, Edward Plesa, has been convicted by jury verdict and is guilty and is convicted of the offense of violation of Sections 301 and 318, Title 47, U. S. C., as charged in Counts I, II, III, IV, V and VI of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged and Ordered that the defendant, Edward Plesa, on Count I of the Indictment, be committed to the custody of the Attorney General of the United States for confinement in the Federal Prison Camp at McNeil Island, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Five Months.

It Is Further Adjudged and Ordered that the defendant, Edward Plesa, shall pay a fine to the United States of America in the sum of One Dollar on each of Counts II, III, IV, V and VI of the

Indictment, and shall stand committed until such fines are paid.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done In Open Court this 12th day of September, 1949.

/s/ JOHN C. BOWEN,  
United States District Judge.

Presented by:

/s/ JOHN F. DORE,  
Asst. United States Attorney.

Violation of Federal Communications Act.

[Endorsed]: Filed September 12, 1949.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Names and addresses of Appellants: Ralph Casey, George LaClair and Edward Plesa; 304 Spring St., Seattle 4, Washington.

Names and addresses of Appellants' attorneys: Allan Pomeroy and Robert C. Royce, 304 Spring St., Seattle 4, Washington.

Appellants were convicted by a jury on six counts charging them with operating a radio station without a radio license on different dates, Title 47 U.

S. C. 301, and operating a radio station on different dates without having had issued to them a radio operators' license, Title 47 U. S. C. 318.

Subsequent to the verdict the appellants filed a motion for new trial and on the 12th day of September, 1949, the above-entitled court denied appellants' motion for new trial and entered judgments of conviction on all six counts as to all three defendants and sentenced them as follows:

Ralph Casey—Seven months confinement on Count I; one dollar on each of counts II, III, IV, V and VI.

George LaClair—Seven months confinement on Count I; one dollar on each of counts II, III, IV, and VI.

Edward Plesa—Five months confinement on Count I; one dollar fine on each of counts II, III, IV, V and VI.

Appellants are not in confinement, having been admitted to bail by the trial court pending appeal.

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated order denying defendants' motion for new trial and the above-stated judgments.

/s/ ALLAN POMEROY,

/s/ ROBERT C. ROYCE,

Attorneys for Appellants.

Dated: September 19, 1949.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 20, 1949.

[Title of District Court and Cause.]

APPROVAL OF STIPULATION, STAYING  
COMMITMENT OF DEFENDANTS AND  
AUTHORIZING CLERK TO SEND TRANS-  
SCRIPT OF RECORD

This Matter having been brought on before the undersigned Judge of the above-entitled court on the motion of the defendants by their substituted counsel of record that the motion of the defendants that they be allowed to move for reinstatement and redocketing of the appeal in the above-entitled action, heretofore taken on September 12, 1949, and dismissed by the Circuit Court of Appeals on January 9, 1950, for failure to deposit the approximate cost of printing of the record in said cause, be granted, and the Court having read the stipulation heretofore entered into by and between the United States District Attorney for this District, and his assistant, and F. M. Reischling, counsel for the defendants, and it appearing to the Court that good cause has been shown for the reinstatement and redocketing of said appeal, and that the transcript of the record should be returned to the Clerk of the Circuit Court for printing, and that pending the determination of said appeal the commitment of the defendants should be stayed and they remain at liberty on bail as has hereinbefore been fixed, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed by this Court that the defendants in this cause be per-

mitted to apply to the said Circuit Court for reinstatement and redocketing of said appeal, and that the Clerk of this Court be and hereby is authorized to return the transcript in said cause to said Clerk for printing, and

It Is Further Ordered, Adjudged and Decreed that pending the determination of the issues in this matter on appeal that the commitment of the defendants be stayed and they remain at liberty under the bonds hereinbefore fixed by this Court.

Done In Open Court this 1st day of March, 1950.

/s/ JOHN C. BOWEN,  
United States District Judge.

Presented by:

/s/ F. M. REISCHLING,  
Of Counsel for Defendants.

Approved and notice of presentation waived.

/s/ J. CHARLES DENNIS,  
U. S. Attorney.

/s/ JOHN F. DORE, JR.,  
Asst. U. S. Attorney.

**[Endorsed]:** Filed March 1, 1950.



[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT, TO RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Sub-division I of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 39(b) (1) of the Federal Rules of Criminal Procedure, I am transmitting herewith as the record on appeal in the above-entitled cause, all of the original pleadings on file and of record in said cause in my office at Seattle, as set forth below, and that said pleadings, together with the Plaintiff's Exhibits numbered 9 and 11, constitute the record on appeal from the Judgments filed and entered September 12, 1949, to the United States Court of Appeals at San Francisco, California, to wit:

1. Indictment.
2. Arraignment and Plea.
3. Praeipe for Subpoena (Carolyn Larson, et al.).
4. Motion to Suppress Evidence and Return Seized Articles.
5. Praeipe for Subpoenae (Donald L. McPherson, et al.).

6. Praeceptum for Subpoenae (Samuel Standard, et al.).

7. Memorandum of Authorities in Support of Motion to Suppress.

8. Marshal's return on Subpoena (John Watson).

9. Marshal's return on Subpoenae (Bess F. Donnelly, et al.).

10. Marshal's returns on Subpoenae (Jean Page et al.).

11. Marshal's return on Subpoena (Claude L. Perkins).

12. Marshal's returns on Subpoenae (Edward H. Hart, et al.).

13. Affidavits of Edward C. Scully, Herbert H. Arlowe and Everett K. Ames.

14. Memorandum of Authorities in Answer to Government's Position.

15. Memorandum of Authorities Against Motion to Suppress Evidence.

16. Marshal's returns on Subpoenae (Walker et al.).

17. Marshal's return on Subpoena (Larson).

18. Marshal's return on Subpoena (Johnson).

19. Praeceptum for Subpoenae (Roy Turner et al.).

20. Praeceptum for Subpoena (Wiebelhaus).

21. Marshal's return on Subpoena (Wiebelhaus).
22. Praecipies for Subpoenae (Bob Colman et al.).
23. Government's Requested Instructions.
24. Praecipe for Subpoenae in blank.
25. Marshal's return on Subpoena (Turner).
26. Marshal's return on Subpoena (Colman).
27. Praecipe for Subpoena (Walter Mills).
28. Praecipe for Subpoenae in blank.
- 28½. Defendants' Requested Instructions.
29. Verdict.
30. Marshal's return on Subpoenae (Roy Turner et al.)
31. Motion for New Trial.
32. Marshal's return on Subpoena (George Eastman).
33. Judgment, Sentence and Commitment (Ralph Casey).
34. Judgment, Sentence and Commitment (George LaClair).
35. Judgment, Sentence and Commitment (Edward Plesa).
36. Recognizance of Defendant on Appeal (Casey).

37. Recognizance of Defendant on Appeal (La-Clair).

38. Recognizance of Defendant on Appeal (Plesa).

39. Affidavit of Laura LaClaire.

40. Order Exonerating Bail (Casey).

41. Order Exonerating Bail (LaClair).

42. Order Exonerating Bail (Plesa).

43. Notice of Appeal.

44. Mandate dismissing appeal.

45. Substitution of Attorneys (Withdrawal of Allan Pomeroy).

46. Notice of Substitution of F. M. Reischling for Allan Pomeroy as attorney for defendants.

47. Stipulation for Reinstatement and redocketing of Appeal and For Stay of Commitment Pending Determination of Case on Appeal.

48. Order Staying Commitment of Defendants and Authorizing Clerk to return Record on Appeal to Appellate Court.

Plaintiff's Exhibits numbered 5 and 6 (Radio equipment and transmitter) received in evidence at the trial of this cause are bulky, heavy and valuable and are not forwarded with the original record but are retained subject to further direction.

In Witness Whereof I have hereunto set my hand

and affixed the official seal of said District Court at Seattle this 2d day of March, 1950.

MILLARD P. THOMAS,  
Clerk,

[Seal]:     /s/ TRUMAN EGGER,  
Chief Deputy.

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[Endorsed]: No. 12387, United States Court of Appeals for the Ninth Circuit. Ralph Casey, Edward Plesa and George LaClair, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: October 24, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



In the District Court of the United States, for the  
Western District of Washington, Northern  
Division

No. 47792

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RALPH CASEY, EDWARD PLESA and  
GEORGE LaCLAIR,

Defendants.

Before: The Honorable John C. Bowen,  
District Judge.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Seattle, Washington, August 30, 1949

10:15 o'Clock A.M.

Appearances:

Assistant United States Attorney John F. Dore  
and Assistant United States Attorney Vaughn E.  
Evans, appearing for and on behalf of plaintiff.

Allan Pomeroy and Robert C. Royce, appearing  
for and on behalf of defendants.

Whereupon, a jury having been duly im-  
panelled and sworn, and opening statement  
made on behalf of plaintiff, the following pro-  
ceedings were had and done, to wit:

The Court: Call plaintiff's first witness.

Mr. Evans: Mr. McPherson, please.

## DONALD McPHERSON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [2\*]

\* \* \*

## Direct Examination

By Mr. Evans:

Q. Will you state whether or not you have ever had any experience as a radio operator?

A. Yes, I have.

Q. Will you tell us what that experience has been?

A. I have operated an amateur station over a period of years, since, I think it was 1929 or 1930. I am not exactly sure of that date now. I operated for the United States Government at a station in Boise, Idaho. The call letters were WABJ.

Q. Will you state whether or not you now have a license to operate an amateur station?

A. I have.

Q. State whether or not you likewise have a license for the station operation? [3]

A. I have.

Q. On the evening of February 7, 1949, state whether or not you were using your radio set?

A. I was.

Q. State whether or not you heard any unusual signal at that time?      A. I did.

Q. Will you state what time of the evening that was?

(Testimony of Donald McPherson.)

A. About 1910 p.m., Pacific Standard Time.

Q. In regular clock time, what time would that be?

A. 7:10 in the evening.

Q. That was on what day?

A. February 7.

Q. What year?

A. 1949.

Q. State at what frequency, or what other means you [4] have of identifying upon your radio band, that you heard this unusual signal?

A. Approximately 3540 kilocycles.

Q. 3540 kilocycles is within what band, if you know, as set aside by the Federal Communications Commission?

A. It is the amateur band, within the limits of 3500 kilocycles and 4000 kilocycles, authorized for amateur communication.

Q. What type of communication is that band reserved for, if you know?

A. Part of it is for code operation and part of it is for phone operation.

Q. What part of it is reserved for code operations?

A. Those frequencies between 3500 kilocycles and 3850 kilocycles.

Q. Will you explain to the jury what you mean by code operation?

A. It is international Morse, consisting of dots and dashes.

Q. Will you state what this unusual signal was that you heard?

A. It was voices.

Q. Will you state whether or not voices are authorized on that particular frequency?

(Testimony of Donald McPherson.)

A. They are not. [5]

Q. Over what period of time did you hear these voices?

A. For a period of approximately 20 or 25 minutes.

Q. Will you state what the voices were saying that you heard?

A. Yes. It was a repetition of the words, as I remember them, "One, two, three, four, testing for modulation. Can you hear me, can you hear me," repeated, and "Call a cab, call a cab," and there was one sentence that was uttered, "Call a cab and go to rendezvous No. 5."

Q. Will you state whether or not you made any notes on what you heard?      A. I did.

Q. Do you have those notes with you?

A. I have.

(Notes marked Plaintiff's Exhibit 1 for identification.)

Q. Mr. McPherson, will you refer to what has been handed you, marked Plaintiff's Exhibit 1 for identification, and state whether or not that is the memorandum which you made at the time you were listening to these voices on the code band?

A. That is the notes I took at the time.

Q. Made in your handwriting?      A. Yes, sir.

Q. In this particular band at this particular frequency [6] that you speak of where you heard these voices, were you communicating with anybody or was anybody communicating with you, or

(Testimony of Donald McPherson.)

were you listening to anything on that band at the time when you heard these voices?

A. On approximately that frequency, 3540 kilocycles, there was a group of amateurs that gathered there for the purpose of communications and the relay of messages within the working area of the station.

Q. At the time when you heard these voices, was anybody using that net?      A. Yes, I was.

Q. Will you state whether or not these voices in any way interfered with that operation?

A. They did, very definitely.

\* \* \*

Q. Will you state whether or not on this particular net there are any amateurs outside of the State of Oregon who use that net?

A. Yes, there is.

Q. Where are they located? [7]

A. There is one station in Kuna, Idaho, that reported in. There is another station in Oakland, California, that reported in.

Q. Will you state whether or not this jamming, as you speak of it, interfered with your receiving their signals?      A. It did.

Q. Will you state whether or not you took any steps to notify anybody of this jamming?

A. I did.

Q. What, if any, steps did you take?

A. I originated a message to the Federal Communications Commission office in Portland, Oregon, relayed it through a station in Portland.



(Testimony of Donald McPherson.)

Q. Whose station was that that you relayed it through? A. Mr. Hart, W7COB.

Q. Did you make any written memorandum of the message as you sent it or before you set it or after you sent it?

A. I wrote the message out before I sent it.

Q. Do you have that message with you?

A. I do.

Q. As I understand it, that is the reverse side of what has been marked Plaintiff's Exhibit 1?

A. That's right.

Mr. Evans: May we have the reverse side of what has been marked Plaintiff's Exhibit 1 marked for [8] identification as Plaintiff's Exhibit 2?

(Message marked Plaintiff's Exhibit 2 for identification.)

Q. You have been handed what has been marked for identification as Plaintiff's Exhibit 2. I believe you previously identified that as a copy of the message which you transmitted to Mr. Hart, is that correct? A. This is the original message.

Q. Will you state whether or not you did transmit that message to Mr. Hart? A. I did.

Q. Will you state how you were able to transmit it to Mr. Hart?

A. Well, by moving off the frequency just a little bit, Mr. Hart was able to hear my signals. I advised him to clear the frequency and copy my message.

Q. And was that accomplished? A. It was.

Mr. Evans: I offer Plaintiff's Exhibit 1.

Mr. Pomeroy: That is objected to as incom-

(Testimony of Donald McPherson.)

petent, irrelevant and immaterial. He has testified to it, nothing connected with these defendants. It is self-serving.

The Court: Do you wish to make a statement now or later or at all, Mr. Evans? The Court will give you [9] whatever opportunity you wish in that connection.

Mr. Evans: I believe it has been testified to that these are the notes that this witness made at the time he heard the signal. It is offered for the purpose of showing that a signal was heard in interstate commerce, which is one of the elements of this offense, and only for that purpose. We can't put all our witnesses on at once, I realize. Later we will show that these defendants sent that signal, but right now the only purpose is to show that a signal was heard in interstate commerce on this particular band.

The Court: I think the Court should reserve ruling until there is some connection, some circumstance established tending to connect the defendants with this physical data which comprises Plaintiff's Exhibits 1 and 2.

Mr. Evans: Very well.

Mr. Pomeroy: If the Court please, there is another matter which I think is more important than that, and that is the fact this man has already orally testified to what he heard. Now, to supplement that with a self-serving group of notes, I don't think is proper evidence.

The Court: The Court has reserved ruling.

Mr. Pomeroy: Very well.

(Testimony of Donald McPherson.)

Mr. Evans: I will likewise offer Plaintiff's [10] Exhibit 2.

The Court: The same reservation is made with reference to that.

Mr. Pomeroy: Objection is made to the exhibit.

The Court: That objection will be considered later when it is offered again.

Q. Will you state whether or not you made any formal written communication to the Federal Communications Commission in regard to what you heard on the night of February 7, 1949?

A. I did.

(2-14-49 letter marked Plaintiff's Exhibit 3 for Identification.)

Q. You have been handed what has been marked for identification as Plaintiff's Exhibit 3. Will you state whether or not you can identify it?

A. I can.

Q. State what it is?

A. It is a letter that I wrote to the Federal Communications Commission office in Seattle, Washington, upon their request.

Q. State whether or not it deals with the jamming which you testified you heard on the air?

A. It does.

Mr. Pomeroy: I will object to that, if the Court please. It is an improper question, asking him what is [11] in an exhibit before it has been offered in evidence.

(Testimony of Donald McPherson.)

Q. Will you state whether or not you were able to identify more than one voice at the time you were listening to these voices on the radio?

A. I am of the opinion that there was two persons at the station at the time. [12]

\* \* \*

Cross-Examination

By Mr. Pomeroy:

Q. How long did this broadcast continue that you listened to?

A. Oh, for approximately a period of 20 minutes that I heard.

Q. For 20 minutes, and they were saying, "Testing, testing, one, two, three, four", is that what you heard?

A. That's right, that was part of it.

Q. And they went on for how long, would you say? A. About 20 minutes, I would say.

Q. And it was on this particular dial, is that it, 3540 kilocycles, within five or ten kilocycles of that? A. That's right.

Q. In other words, your instrument is not calibrated to the extent that you could be exact?

A. The one I had at that time wasn't.

Q. That is the only time we are talking about, isn't it, at that time? We are not talking about any other time except the once, are we?

A. No, sir.

Q. You say a group of you used that particular part of the band? A. Yes.

(Testimony of Donald McPherson.)

Q. What group?

A. Comprised of amateurs all over the states of Oregon, Washington and California. [15]

\* \* \*

## EDWARD HART

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

### Direct-Examination

By Mr. Evans:

Mr. Pomeroy: If the Court please, at this time I move to strike all the testimony of the last witness, Mr. McPherson, and the jury should be instructed to disregard it, unless it is at a future time made competent by some further evidence. I wish the motion to be of record.

The Court: The Court will reserve ruling for later developments.

Q. Will you state your full name, please, and spell it for the reporter?

A. Edward H. H-a-r-t.

Q. In what city do you live?

A. Portland, Oregon.

Q. Will you state whether or not you have had any experience as a radio operator?

A. I have had four years on shipboard as a radio operator.



(Testimony of Edward Hart.)

Q. What years were those?

A. 1930 to '34. [19]

\* \* \*

Q. Calling your attention to the night of February 7, 1949, will you state whether or not you were listening on your radio set?

A. Yes, sir, I was. [20]

\* \* \*

Q. About what time of the day or night were you listening?

A. Between 7 and 9 p.m., roughly.

Q. Will you state whether or not you heard any unusual signals during that period of time?

A. I did, yes.

Q. State at what frequency you heard those unusual signals?

A. I had tuned down to the Oregon amateur net frequency of 3540 to talk to a few of the fellows before their time of 7:30 for net time approached, to talk to Mr. McPherson and the rest of the fellows, and the frequency was being jammed by voice transmission.

Q. You speak of talking to some of the other fellows. What do you mean by "talking to them?" Do you mean by voice, or some other means?

A. No, on that particular frequency, it is licensed only for code transmission, which is dots and dashes.

Q. Who reserves that band for that purpose, if you know?

(Testimony of Edward Hart.)

A. It is allocated to the amateurs of the United States by the Federal Communications Commission.

Q. What did you hear these voices saying?

A. The voice I heard was saying, "Testing, one, two, three, four," and it was repeating that over and over. I heard it approximately for ten minutes.

Q. Will you state what effect, if any, these voices had on the code operation at that frequency?

A. Well, ordinarily in receiving Mr. McPherson at my location, he is running approximately—he is using approximately 900 watts of power, and in terms of what us amateurs call "knocking the receiver off the table," he is really loud. This signal was completely jamming him.

\* \* \*

Q. You have been handed what has been marked for identification as Plaintiff's Exhibit 2. Will you state whether or not that is the message which you received from Mr. McPherson? [22]

\* \* \*

Q. State how accurately the instruments which you have can measure the frequency of the station which you are receiving?

A. Within one kilocycle or 1000 cycles.

Q. Will you state whether or not you ever made a written report of this jamming to any Federal Communications Commission office?

A. I sent a letter to the engineer in charge, Portland, Oregon, an affidavit to the effect of what

(Testimony of Edward Hart.)

I heard on that frequency and the time I heard it and the date. [23]

\* \* \*

HERBERT ARLOWE

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct-Examination

By Mr. Dore: [26]

\* \* \*

Q. Have you ever given an examination to any of these three defendants, either for an operators license or station license?

A. I don't believe we ever have; at least, they have never been issued any operators licenses.

Q. Where are the records kept concerning operators licenses and station licenses?

A. We have a copy of amateur station and operators licenses in our office.

Q. Is that a complete record and file?

A. It is complete for our district.

Q. Are those records in your office?

A. Yes, they are.

Q. Where is your office located?

A. In Rooms 801-810, Federal Office Building.

Q. Are you the custodian of those records?

A. I am in charge of the office, yes.

Q. You are familiar with those records?

A. Yes.

(Testimony of Herbert Arlowe.)

Q. Have you examined them?

A. Yes, we have.

Q. Have you examined them concerning Ralph Casey, Edward Plesa, and George LaClair in this case? A. Yes.

Q. Do you find in those records any license for any of these three men?

A. The records show that they do not have any operators or station licenses. [28]

\* \* \*

Q. On or about that time, did you receive a complaint as to an unlicensed operator or unlicensed station in this area? A. My office did, yes.

Q. What was the nature of that complaint, if you know? [29]

\* \* \*

A. The complaint was received from an amateur radio operator, Herbert Auckland, while he was driving down one of the avenues here in Seattle, he heard a voice transmission concerning——

Mr. Pomeroy: I object to this as being hearsay.

The Court: You cannot say what he heard. Say what he did.

The Witness: He reported that transmission.

\* \* \*

The Witness: He reported this transmission to our office.

Q. And then what did you do?

A. We tuned on to that frequency.

Q. What frequency was that?

(Testimony of Herbert Arlowe.)

A. That was the frequency of 3936 kilocycles.

Q. On what date was that?

A. That was February 2. [30]

\* \* \*

Q. What was that frequency again?

A. That frequency on that date was 3936 kilocycles.

Q. You say you then tuned in on this frequency? Did you have the necessary equipment there at your office or was it located elsewhere?

A. It was at the office.

Q. What type of equipment is that?

A. We have two types; one to use in the office, an ordinary receiver, and the other is a mobile direction finder, located in a car. [31]

\* \* \*

Q. I will direct your attention to February 4 specifically and ask you if at that time you intercepted any signal or broadcast that was unusual?

A. Yes. [32]

Q. At what time of day?

A. I would say between 1 and 3 o'clock in the afternoon.

Q. And on what frequency?

A. 3540 kilocycles.

Q. What is the nature of that frequency?

A. The voice was testing, testing for modulation, and talking about racing information.

Q. More specifically, as to racing information, do you recall any other communication at that time?



(Testimony of Herbert Arlowe.)

A. In connection with the testing, the voice would give directions to Ralph and Eddie to call if they could hear the transmission.

Q. Was there anything peculiar about the characteristics of the transmitter, or the transmission?

A. Yes, very peculiar, because no call letters were transmitted, indicating that it was an unlicensed station.

\* \* \*

Q. Did you hear any other such transmissions on that day?

A. That was the general trend of the transmission.

Q. Over what period did that last?

A. Approximately from 1 to 3 in the afternoon.

Q. 1 until 3. Was that on the code band?

A. Yes, that is in the code band. [33]

Q. You say that these were voices you heard?

A. Voices, yes.

The Court: I did not understand what the code band was in this connection.

The Witness: The code band is from 3500 to 3850 kilocycles.

Q. Directing your attention to your position there with the FCC, are you in charge of this investigation concerning this report?

A. Yes, I am in charge of it.

Q. Did you issue any instructions for investigation to other of your assistants at that time?

A. I did, yes.

Q. And what did you do by way of investiga-

(Testimony of Herbert Arlowe.)

tion at that time to endeavor to locate this allegedly illegal transmitter?

A. I assigned Mr. Ames in charge of the mobile unit. We call it the mobile unit, it is an automobile with a direction finding receiver to take bearings on the signal.

Q. What do you mean by the signal?

A. To take bearings on the signal issuing from this transmitter.

Q. And he was in charge of that. What type of automobile is it?      A. It is a Plymouth sedan.

Q. What type of equipment does it carry? [34]

A. It carries a radio receiver capable of receiving on frequencies from 500 kilocycles to—well, there are several receivers, and the receiver that they used at that time would receive to about 36,000 kilocycles.

Q. From 500?      A. From 500 to 36,000.

Q. You say that there was also a loop?

A. It is equipped with a loop antenna. The loop is capable of being moved; that is, rotated.

Q. What is the purpose of that?

A. When the loop receives a signal and the plane of the loop is toward the station, then the signal is loudest, and when the plane of the loop is crossways from the direction of the station, the signal is minimum, thereby indicating which direction the signal is coming from.

Q. What is this equipment used for?

A. For locating stations.

(Testimony of Herbert Arlowe.)

Q. Did you have any other equipment in this investigation?

A. The other equipment that we heard the signal over was located in the office. That was another receiver, another similar receiver.

Q. Does it have a loop device?

A. No, it doesn't.

Q. Is this loop device what is commonly known as a radio direction finder? [35]

A. That is right.

Q. Such as they use on ships and yachts?

A. Very similar to what they use on ships. You can get more than one bearing by moving the car while the signal is on the air.

Q. Concerning this specific investigation, what occurred and what was done by way of investigation on February 5, 1949?

A. I assigned Mr. Hallock and Mr. Ames on the mobile unit, the car, and Mr. Dietsch to go aboard a Coast Guard cutter and proceed outside of the boundaries of the State of Washington, namely, in Puget Sound, to listen for the signal at the same time. [36]

\* \* \*

Q. What had you yourself done that day concerning the investigation?

A. I remained in the office and listened to the signal coming over the office receiver.

Q. What time of the day or night was that?

A. That was in the afternoon of February 5,

(Testimony of Herbert Arlowe.)

approximately the same time, from 1 until 3. Some days it would vary a little bit.

Q. 1 to 3? A. Yes.

Q. And you listened to that over the duration of the period of 1 to 3 that day?

A. That's right.

Q. Did you listen at any other time during that day?

A. Not that I recall. We may have listened a shorter and longer time; that is, starting in at noon and listening to a later period, but we didn't hear any signals outside of approximately that period.

Q. Would you describe those signals that you heard on that afternoon of February 5 between the hours of 1 to 3?

A. As I recall, on that day it was, "Testing, one, two, [37] three, four, testing for modulation," and the voice mentioned names of—names like we later determined were the names of horses running in a race, also mentioned the number in connection with the name. For instances, he might say on that day, "Manzanito, No. 6."

Q. Any other such horses names that you recall?

A. I think there was one by the name of War Again, or Warpath, something like that.

Q. Do you recall any other language in the communication?

A. During the test, the person talking over the radio-telephone would ask Casey or Eddie or Ralph whether he could hear the signal.

(Testimony of Herbert Arlowe.)

Q. Was there any response by any other voice in these transmissions?

A. We heard no other communication in return, no.

Q. Were any other persons' names used in the communication?

A. One day the name Joe was mentioned, but I can't remember which day that was.

Q. You say that you had this other equipment there and the reports of the investigation by Ames and Hallock. Did they that day report to you that they had made any location as to the possible place of these broadcasts?

A. The bearings that they reported to me indicated that the signal was in the neighborhood of First and Spring, First [38] Avenue and Spring Street.

Q. Do you know what structure is in that area?

A. The Arlington Hotel is at that location.

Q. From the reports made to you, were they any facts showing whether the equipment was located down low or high up?

A. No indication that day whether it was low or high.

Q. Were these calls on the 3540 band on that day between 1 and 3?      A. Yes, they were.

Q. Were there any other voices on that band that day?

A. Sometimes the voice would be different than the other times. One person had a characteristic in



(Testimony of Herbert Arlowe.)

his speech that didn't show up in the speech of the other person.

Q. Do you personally know whether these communications were recorded on that day?

A. Yes, the communications were recorded every day. [39]

\* \* \*

Q. You say that you sent Mr. Dietsch, and who was the other man?

A. Mr. Dietsch was sent by me to board a Coast Guard cutter and proceed out in the waters of Puget Sound.

Q. You said that he reported back he had done that? A. He did that. [41]

Q. Yesterday you testified concerning the dates of February 4, 1949, and February 5, 1949, concerning your investigation of this case. I will now direct your attention to February 6, 1949, and ask you if any investigation of the case was made on that date? A. No, it wasn't.

Q. Why was that?

A. The office was closed, and we understood that there would be no races, so we expected no transmissions.

Q. Directing your attention to February 7, 1949, were [43] you in charge of the investigation of this case on that date? A. I was.

Q. And who was working with you on the 7th?

A. Mr. Ames and Mr. Hallock were assigned to the mobile unit, and Mr. Watson was assigned to record all transmissions received in the office.

(Testimony of Herbert Arlowe.)

Q. What did you proceed to do in the way of investigation on that date?

A. I heard the transmissions from this unlicensed station.

Q. At what time of the day or night was that?

A. As I remember, it was 12:26 in the afternoon, right after noon.

Q. Where were you at this time?

A. I was in the office where the receiver was located.

Q. What did you hear at that time?

A. I heard the usual test procedure, "One, two, three, four, testing for modulation," and directions to Ralph and Edward and also Casey was mentioned, and for them to——

Q. Do you recall any of that language used on that broadcast at that time?

A. At that time from 12:30 until 1 the test included a direction for Ralph and Edward to go to Franco's Cafe.

Q. Do you recall any other language used?

A. At 2, from 2 till 2:14, as I recall, this voice directed Edward to raise his hand, and also, "Plesa, please raise your hand," also, "Ralph, raise your hand if you hear me," also, "Edward, cross the street even though you are crossing against the red light," also, for Casey to do a little dance.

Q. You were at your office during that time?

A. I was.

Q. What were the characteristics of that signal

(Testimony of Herbert Arlowe.)

or communication or transmission on that day when you heard it?

A. It was a voice transmission, part of it being, "Testing for modulation, do you hear me, do you hear me, raise your hand if you hear me."

Q. Was there any identification of a station?

A. No identification.

Q. Concerning the identification procedure, was there any standard identification used?

A. No call letters signed or no other identification that is regularly licensed.

Q. Do you know whether there was any interference with interstate communication that day, to your knowledge?

A. I do know that there was interstate communication in the evening of that day.

Q. Did you hear that broadcast?

A. I did not hear it, Mr. Hallock heard it.

Q. What else did you do on the afternoon of the 7th? [45]

A. Shortly after I heard this direction for Ralph and Edward to go to Franco's Cafe, and after I looked up to find where Franco's Cafe was located, I walked on the street, on First Avenue, and I observed a person with a light brown overcoat with a hearing aid receiver in his ear standing on the corner of First and Spring.

\* \* \*

Q. Was there anything peculiar about that?

A. We were looking for a man with a hearing

(Testimony of Herbert Arlowe.)

aid, that is why I noticed it. I noticed also that there were extra wires showing. From the front of his coat where his coat was hanging open, there were extra wires that you would normally not see.

Q. Where did you see this man?

A. The corner of First and Spring.

Q. Can you identify that person you saw here in the courtroom today?           A. I can, yes.

Q. Would you point him out to the Court and jury, please?

A. He is sitting beside Mr. Pomeroy, Ralph Casey.

Q. Did you speak to him at that time?

A. No.

Q. What was he doing when you saw him?

A. He was just standing looking around. He had one hand in his left coat pocket. While I observed him, the man that I now recognize as Eddie Plesa approached him. They stood and talked together for a few minutes and then proceeded up [47] First Avenue.

Q. That was in the City of Seattle?

A. Yes.

Q. It was located at First and Spring, you say?

A. That's right.

Q. Are there any hotels immediately adjacent to that location that you observed?

A. The Arlington Hotel is across Spring Street.

Q. By way of your investigation, were you able to locate the place of transmission on that date?

(Testimony of Herbert Arlowe.)

A. We were able to locate it, yes. The mobile unit located the source of transmissions.

Q. As where?

A. The indication was the Benjamin Franklin Hotel.

Q. What band was the transmission or broadcast operated on that day?

A. It was within the band 3500 to 3850; specifically on 3536 kilocycles, very approximately.

Q. Were you able to identify any of the voices on the signals that day?

A. The voice that day was the same as the voice had been for the majority of the time. [48]

\* \* \*

Q. I will direct your attention to February 8, 1949, and ask if any investigation was made during that day.

A. We were alerted to investigate, but we heard no signals.

Q. Directing your attention to February 9, 1949, did you make an investigation at that time?

A. We did.

Q. Who worked with you on that day?

A. The same persons, Hallock and Ames, on the mobile unit. Also, Mr. Wood drove the car for me on another unit to work with the mobile unit for a part of the period on the 9th.

Q. What did you personally do by way of investigation on the date of February 9?

A. I heard the signal come on again shortly after 1 o'clock, I think it was about 1:15.



(Testimony of Herbert Arlowe.)

The Court: Repeat the date, please.

The Witness: The 9th, February 9.

Q. During the day or evening?

A. Afternoon. [49]

The Court: What year?

The Witness: 1949.

Q. What did you hear at that time?

A. I heard the usual procedure of testing for modulation, and directions to raise—for Ralph and Eddie to raise their hand if they were able to hear the signal, also that day, to indicate if the signal was any better than it was the preceding day.

Q. Over what period of time did this transmission occur?

A. It was a very short transmission that day. I think it ended about 1:45.

Q. Do you remember any specific language used on that day in that communication?

A. Yes. They mentioned that the horses were at the post, now running, now running, and then he would give a number of the winning horse. He did that three times.

Q. Do you remember any of the horses on that day mentioned?

A. He gave no name. He only gave a number.

Q. Do you remember any of the numbers as of that day?

A. I can't be specific which numbers were given that day. Always the numbers were low numbers, though, 3, 6, 9, numbers like that.

(Testimony of Herbert Arlowe.)

Q. What else did you do by way of investigation that day?

A. I was in another mobile unit that was equipped with [50] a receiver to indicate signal strength. When I drove by—when Mr. Wood drove the car that I was using by the Benjamin Franklin Hotel, the meter in this receiver indicated maximum strength, indicating that we were as close as we could get to the signal on the street.

Q. Then what did you do?

A. I listened further, and the signal did not come back on again.

Q. About what time of day was that?

A. About 1:45.

Q. Then what occurred after that?

A. Nothing further that day. The other mobile unit found the same result, but Mr. Ames will relate that.

Q. What were the characteristics of the signal on that day?

A. The same as before, a voice transmission, testing for modulation. One slight difference was that the transmissions were shorter.

Mr. Pomeroy: What date is this we are talking about?

Mr. Dore: February 9.

Mr. Pomeroy: 1:15?

The Witness: 1:15 to 1:45.

Q. Are you aware from your knowledge of any jamming or the interception of any interstate communication on that day? [51]

(Testimony of Herbert Arlowe.)

A. No, I am not.

Q. Were you able to identify the voice?

A. The voice sounded the same on that day as it did the previous day, that is the voice that was on the majority of the time, as I remember.

Q. All of these tests were made in the limits of the City of Seattle on that day? A. Yes.

Q. I will now direct your attention to February 10, 1949. Were you in charge of the investigation of this case on that day? A. I was.

Q. Who was working with you on that day?

A. The same personnel, Hallock and Ames on the mobile unit, Watson to record. I left the office shortly after the transmissions were heard and went with Mr. Wood.

Q. About what time of day was that?

A. The transmissions started at 12:26, and as soon as I heard them, I proceeded immediately to the vicinity of the Benjamin Franklin Hotel.

Q. And then what happened?

A. After I determined that to my own satisfaction and received word confirming this from Mr. Ames, we proceeded to enter the hotel.

Q. By what method did you confirm these facts, or this [52] suspicion, to your own satisfaction?

A. That the signal received on the receiver was strongest in the vicinity of the hotel.

Q. Were you in the direction finder car that day?

(Testimony of Herbert Arlowe.)

A. I was not. That was Mr. Ames that had the direction finder.

Q. What type of equipment did you have in your car?

A. I had an ordinary receiver with a meter that indicated the relative strength of the signal.

Q. Is that a standard method used by the Federal Communications Commission to determine strength?

A. That is the auxiliary method.

Q. How does that work? You might explain to the Court and jury just how that method works.

A. A radio signal emanating from an antenna is strongest right at the antenna. Then as you proceed away from the antenna in all directions the signal gets weaker and weaker until at some distance away from the antenna it will become so weak that the average receiver won't be able to receive it. So going on this method we have a meter in the receiver that indicates the relative signal strength received in the receiver, so as you approach the antenna, this meter indicates a stronger and stronger signal, so that if you made concentric circles around the antenna, you would have the same signal strength, but as you made a smaller circle, the [53] strength would go up.

Q. After you determined that, what other facts led you to believe that the apparatus of transmission was located in the Benjamin Franklin Hotel?

A. A report received from Mr. Ames that the bearings crossed on the Benjamin Franklin.

(Testimony of Herbert Arlowe.)

Q. After receiving that report, and taking into consideration your own findings, what did you do?

A. We proceeded into the hotel. I accompanied Mr. Ames to the various floors of the hotel.

Q. This is the Benjamin Franklin Hotel?

A. The Benjamin Franklin Hotel. We proceeded to the various floors of the hotel until he reported to me that the strongest signal was in or near Room 1217. [54]

\* \* \*

Q. So this might be clear to the Court and jury and to myself, would you start back at the time you entered the Benjamin Franklin Hotel? You said "we entered the Benjamin Franklin Hotel." Who do you mean by "we"?

A. I mean Mr. Ames and myself and Mr. Hallock.

Q. What equipment did you have at that time?

A. I had no equipment on my person.

Q. What equipment did the other men have?

A. Mr. Ames had a very small receiver equipped with earphone and a meter.

Q. What type of receiver was that?

A. It was a radio receiver tuned to this frequency, 3536 kilocycles.

Q. Did the other gentleman have any radio equipment or detection equipment with him?

A. No.

Q. Did you supervise these men in their procedure through the hotel?

A. I did.



(Testimony of Herbert Arlowe.)

Q. What were your orders?

A. To proceed to the various floors of the hotel to determine what location the strongest signal was received.

Q. Do you know from your own personal knowledge what [55] location that was?      A. I do.

Q. Where was that?

A. I walked beside Mr. Ames and heard the signal emanating through the door of Room 1217. I heard the voice.

Q. What do you mean, emanating through the door?

A. I heard the voice coming through the little peekhole in the door.

Q. What do you mean by a peekhole in the door?

A. Those doors are equipped with a very small grillework and a little shutter inside, so that the person inside can open the shutter and see who is at the door.

Q. Was the shutter open or closed at that time?

A. It was closed.

Q. How did you happen to listen at that door?

A. For the reason that Mr. Ames advised me that that was the location of the strongest signal.

Q. Were you with Mr. Ames at that time?

A. I was.

Q. You were beside him at that time?

A. That's right.

Q. And he had this receiver equipment?

(Testimony of Herbert Arlowe.)

A. Yes.

Q. Commonly called a squawker box?

A. No, we haven't any name for it. It is a very small [56] portable receiver.

Q. Did you hear what was coming out of the receiver?      A. No.

Q. You couldn't hear what was coming out of the receiver?      A. No.

Q. Why was that?

A. Because the phone of the receiver was in Mr. Ames' ear.

Q. Directly prior to that, had you seen any of these men in the hotel?

A. I hadn't personally, no.

Q. What did you hear coming through the little slot in the door?

A. I heard the voice that sounded like the same—which sounded like the voice we had heard over the radio, "testing, one, two, three, four, testing for modulation."

Q. What time of day was that?

A. 1:46 in the afternoon.

Q. Was anybody else with you besides Mr. Ames at the door?      A. No.

Q. What did you do then?

A. There is one other thing I would like to relate first.

Q. What is that?

A. And that is that long distance telephone calls had been coming to Room 1217. I had asked the

(Testimony of Herbert Arlowe.)

operator, Miss [57] Donnelly, prior to this to indicate which room these periodic long distance telephone calls were coming to. She advised me before we went upstairs that they were coming to 1217.

\* \* \*

Q. I will ask you, did you advise the telephone operator in the Benjamin Franklin Hotel to keep track of these calls coming to a certain room?

A. I did.

Q. Did she report to you concerning that?

A. She did.

Q. Pursuant to that report, what did you do?

A. I proceeded to Room 1217.

Q. After you heard this voice at the door, what did you do?

A. I returned to the lobby of the hotel to determine who was registered to be in that room.

Q. Did you find out who was registered there?

A. I did, from the hotel records.

Q. Who was registered in that room?

A. George LaClair, Eddie Plesa and Ralph Casey.

Q. What did you do then?

A. I left immediately to come to the United States Commissioner's Office to present a complaint.

Q. Did you do that?           A. I did.

Q. What else occurred? [59]

A. There was some delay.

Q. Just tell us what happened in your own words.

(Testimony of Herbert Arlowe.)

A. At approximately 1:50, I left the hotel, came immediately to the United States Court House building, with the assistance of the United States Attorney made up a complaint, took it to the Commissioner's office, but he wasn't in. I had to wait over half an hour for him to reappear at his office. When he did, he made out the warrants for arrest of these three persons. I proceeded then to the Marshal's office and waited for a marshal to return for a few minutes. Then Marshal Scully went with me to serve these warrants on these three men.

Q. When did you return to the hotel?

A. I would say it was about 3:20 in the afternoon of the 10th.

Q. Having returned to the hotel about that time, what did you and Mr. Scully do?

A. Proceeded immediately to Room 1217.

Q. Tell the Court and jury what occurred at that time.

A. Mr. Scully knocked on the door of 1217, and Eddie Plesa opened the door, and he introduced himself and called for Ralph Casey. Ralph Casey came forward and he served the warrant. He then served the warrant on Eddie Plesa. Then he asked for C. LaClair. The warrant erroneously indicated C. LaClair, because he was registered in the hotel that way. [60] Mr. LaClair did not immediately come forward. Mr. Scully says, "Well, I must take you all to the station if Mr. LaClair does not answer." Then Mr. LaClair came forward and said, "My name is George LaClair."

Q. Do you see that man here today?

A. Yes, I do.

Q. Will you point him out to the Court and jury, please?

A. He is sitting to the left and slightly behind Attorney Pomeroy.

Q. Is it this man here at my right?

A. That is Edward Plesa.

Q. Which man do you mean?

A. George LaClair is the one behind, slightly to the left and behind Attorney Pomeroy.

Q. Would you stand up, please? Is that the man? A. That is George LaClair.

Q. Looking at these three men seated here near Mr. Pomeroy, are those the three men that were in the room? A. They are.

Q. Are they the three men who identified themselves? A. They are.

Q. How long were you in the room?

A. I would say approximately ten minutes.

Q. Did you see anybody else in the room at that time? A. I did. [61]

Q. Who was there?

A. One Joseph Donofrio, also a man who said his name was Brandenburg.

Q. Anybody else in the room?

A. I can't recall that there was anyone, or if there was anyone else, I didn't get his name.

\* \* \*

Q. You say that you looked around the room?

A. Yes.



(Testimony of Herbert Arlowe.)

Q. Did you find any radio equipment at that time? [62] A. No.

Q. Did you later find any radio equipment in that room? A. I did.

Q. In that room?

A. No, not in the room.

Q. Just tell what occurred after you looked around the room.

A. I proceeded from the room, after the arrest, to the Motor Ramp Garage.

Q. In the meantime, what had Mr. Scully done? Where were the defendants?

A. They were in the room for approximately ten minutes. Then he, Mr. Scully——

Q. Were they there during the time you were looking through the room? A. They were.

Q. After the period of ten minutes, were they taken from the room? A. They were.

Q. What did you do after that?

A. I accompanied them to the lobby and then I proceeded to the Motor Ramp Garage.

Q. By "them," who do you mean?

A. Marshal Scully and the three defendants.

Q. Was anybody else with them at that time?

A. Mr. Donofrio was with them.

\* \* \*

Q. After you went downstairs with the men, what occurred then?

A. I left Marshal Scully and proceeded to the Motor Ramp Garage.

(Testimony of Herbert Arlowe.)

Q. Why did you go there?

A. I had received advice that the equipment was in LaClair's car.

Q. Did you proceed to the garage?

A. I did. [64]

Q. About how long did it take you to go from the hotel to the garage?

A. Approximately one or two minutes.

Q. Where is this garage located?

A. It is on Sixth, right off of Westlake.

Q. How far would you say it is from the hotel?

A. It is right around the corner.

Q. Could you judge it in feet or by blocks?

A. It would be two short blocks, it would be right around the corner.

Q. Are there any landmarks adjacent to it that might give a better picture to the jury?

A. It is around the corner from the Orpheum Theater.

Q. And you say it took you about two minutes to get there? Who was with you?

A. Mr. Ames.

Q. Just tell what happened.

A. We found Mr. Hallock standing beside a 1948 Packard car.

Q. Where was the car located?

A. It was in the basement of the Motor Ramp Garage.

Q. Go ahead.

A. I asked if the equipment was in the car.

(Testimony of Herbert Arlowe.)

Mr. Ames said it was. I asked that the car be opened, and it was opened by the garage attendant.

Q. What part of the car was opened? [65]

A. The rear compartment of the car.

Q. Did he open it with a key or did he open it manually? A. He opened it with a key.

Q. Go ahead with your story.

A. We found in it two pieces of baggage. One was a rather large, square piece of luggage they ordinarily term a hatbox, a combination hatbox, shoe box.

Q. What else was in there?

A. A small zipper bag, kind of reddish-brown color.

Q. Did you open these bags?

A. We removed them from the car and opened them, yes.

Q. What did you find therein?

A. In the large box, we found a radio transmitter and power supply and microphone, and in the small bag, we found a receiver and wires, soldering iron, various other radio equipment including a hearing aid earphone.

(Zipper bag marked Plaintiff's Exhibit 5 for Identification.)

(Hat box-shoe box marked Plaintiff's Exhibit 6 for Identification.) [66]

\* \* \*

Mr. Dore: I will offer Plaintiff's Exhibits 5 and 6 in evidence, Your Honor.

(Testimony of Herbert Arlowe.)

Mr. Pomeroy: If the Court please, there will be objection to it on the ground previously mentioned, affidavits of which are on file. Also, there will be testimony directed toward this search and seizure. [69]

\* \* \*

Q. Directing your attention to Plaintiff's Exhibit 6, the big shoe-hat box, could you identify for the Court and jury what is contained therein?

A. I can.

Q. What is in that bag?

A. This is a Harvey radio transmitter, model TVS 50, it states right here. It is capable of use on a range of frequencies from 3.5, or 3500, I should say, 3500 kilocycles to 148,000 kilocycles.

Q. Is there any range strength of that type of transmitter?

A. This has a power normally of about 30 watts input, depending upon the power supply used with it.

Q. Is that commonly known to your trade as a long or short distance transmitter?

A. It would be a long distance transmitter for night use, and a short distance, that is, up to 50 or 100 miles, for day use on the frequency 3536.

Q. Is there any possibility of greater distance being reached by a transmitter of that type through any type of transmission?

A. Depending upon the time of day. If it is at night, it [74] will reach a very great distance, almost

(Testimony of Herbert Arlowe.)

unlimited. It could be heard for two or three thousand miles.

Q. Why is there a difference during the day?

A. In the daytime, the signal does not reflect from the upper atmosphere, called the ionosphere. It is approximately 12 miles above the earth. In the nighttime, this ionosphere becomes more concentrated and will reflect the signal back to the earth at a greater distance.

Q. What is meant by a skip transmission?

A. That is the term ordinarily applied to the fact that the ground signal, the one that is radiated primarily and not reflected, is received for a certain distance, maybe 100 miles. The skip signal is the one that is reflected back from the upper atmosphere and may be received at a greater distance. [75]

\* \* \*

Q. I might ask if the witness knows the setting of that crystal?

A. Yes. The crystal that is in the transmitter is marked 3535.6.

Q. What is the meaning of that?

A. That means that it is 3535.6 of a kilocycle.

Q. On what band did you say this transmitter broadcast?

A. The frequency heard as we measured it measured approximately 3536 kilocycles.

Q. Was that receiver set for the same, if you know?

A. I can't say positively, because it is fixed,



(Testimony of Herbert Arlowe.)

tuned with no calibration. We have not changed the tuning of it.

Q. That is a homemade receiver, you say?

A. That's right.

Mr. Dore: I again offer Plaintiff's Exhibits 5 and 6 in evidence.

The Court: The defendants request, as I understand it, [78] to examine the witness on the voir dire concerning this offer?

Mr. Pomeroy: Yes, Your Honor, and in addition, we might as well make an offer of proof on it and get the whole thing before Your Honor at the one time. I might suggest we make the offer of proof in the absence of the jury.

The Court: The Court grants to the defendants the opportunity of inquiring in respect to any legitimate voir dire examination. Any questions you may wish to ask of this witness concerning the proper admissibility of these exhibits may be indulged, but so far as cross-examination of the witness, unless the examination has been finished, the Court will reserve to the defendants that right for later enjoyment.

\* \* \*

### Voir Dire Examination

Q. (By Mr. Royce) When did you first hear that these defendants were in any way connected with an automobile at the Motor Ramp Garage?

A. When I was in the lobby of the Benjamin Franklin Hotel at approximately 3—well, it was

(Testimony of Herbert Arlowe.)

right after the arrest, 3:35 or something like that.

Q. And who gave you that information?

A. The information came to me from my office.

Q. From whom in your office?

A. From Mr. Wiltse, regional manager.

Q. What action did you take in regard to that information?

A. I proceeded immediately to the Motor Ramp Garage.

Q. Who was with you at the time you received this information regarding the car?

A. There was no one with me at the time, but immediately thereafter Mr. Ames joined me and he verified that the equipment was in the Motor Ramp Garage in a Packard '48 car.

Q. And as I recall your testimony, you testified that you and Mr. Ames then went to the Motor Ramp Garage?

A. That is right.

Q. And you also testified, did you not, that Mr. Hallock was by that automobile there?

A. Yes.

Q. Who is Mr. Hallock?

A. He is an employee in my office. [80]

Q. And were there any police officers there at that time?

A. I think there were. They were more or less in the background. They weren't close to the car or hadn't opened the car.

Q. Was Mr. Donofrio there at that time?

A. I think he was when I joined them, if he

(Testimony of Herbert Arlowe.)

didn't, he came immediately afterward. It was either just before or just after. I can't remember whether he came in just before or after I did.

Q. Did you observe a piece of paper on the windshield of the car?           A. No, I didn't.

Q. Or any note or sticker?

A. I observed the owner's identification.

Q. On the outside of the car, I mean?

A. I didn't observe any paper on the outside of the car.

Q. What happened when Mr. Donofrio came up?

A. As I remember it, he said that he had been sent to remove the car.

Q. Did you arrest him?           A. Oh, no.

Q. Did anybody arrest him?           A. No.

Q. Did the police officers arrest him?

A. No. [81]

\* \* \*

Q. Was the trunk of the car locked or unlocked when you arrived there?

A. When I arrived there, it was locked.

Q. Who unlocked the trunk?

A. As I remember it, it was the garage attendant, Mr. Walker.

Q. A Mr. Walker?

A. It was either Mr. Walker or Mr. Turner, I can't say. They were both there at different times. I can't say now, they will have to testify as to that.

Q. Did he open the trunk at your request?

A. That's right.

(Testimony of Herbert Arlowe.)

Q. How did Mr. Ames know that this material was in the trunk of this car? [82]

A. He told me he had previously seen it there.

Q. Do you know how he got into the trunk?

A. No, I don't.

Q. Is Mr. Ames present in the courtroom?

A. He is.

Q. Will he be a witness in this case?

A. He will.

Q. Which one of the gentlemen is Mr. Ames?

A. (Indicating).

Q. Were these bags open or closed when you saw them in the car?

A. When they were in the car, they were closed.

Q. Directing your attention to the original file which has just been handed to you, opened at the affidavit purporting to be your affidavit executed sometime in August in this cause, I will ask you if that is your signature?

A. The top signature is mine.

Q. Is that your affidavit, Mr. Arlowe?

A. Yes.

Q. Directing your attention to the last paragraph on page 2 of the affidavit and directing your attention to the next to the last sentence, "Mr. Standard, the assistant manager of the hotel, had held the garage claim stub as a security for the payment owed by Casey and the others on the room because a big bill had been run up." Is that your sworn [83] statement?

A. That is what I understood to be the facts.

(Testimony of Herbert Arlowe.)

Q. Where did you get the information?

A. From Mr. Hallock and from Mr. Standard.

Q. From Mr. Hallock and Mr. Standard?

A. Yes.

Q. This is some more hearsay, then?

A. It wasn't hearsay at that time, they were not in court.

Q. You don't know whether it was true or not that Mr. Standard was holding this stub?

A. That is the only way that Mr. Hallock could find out where the car was, was by Mr. Standard's information.

Q. So you got the information from Mr. Hallock?

A. I beg your pardon?

Q. You got the information from Mr. Hallock?

A. I got the information?

Q. Is that where you got it?

A. That was one place I received the information, yes.

Q. When did Mr. Hallock give you this information?  
A. After I arrived at the car. [84]

\* \* \*

Q. What members of your office were present at the Motor Ramp Garage?

A. Mr. Hallock was standing by the car when I arrived and Mr. Ames accompanied me.

Q. Were Mr. Hallock and Mr. Ames acting under your instructions and directions?

A. They were.



(Testimony of Herbert Arlowe.)

Q. In being at this garage? A. Yes.

Q. And opening the trunk of the car? [85]

A. The attendant opened the trunk.

Q. At whose direction? A. Mine.

Q. I mean prior to this time, the time Mr. Ames opened the trunk?

A. I knew nothing about Mr. Ames opening the trunk the first time. That will be his testimony. He was acting in the investigation.

Q. Is Mr. Hallock present in the courtroom?

A. He is not present right now.

Q. Will he be a witness in the case?

A. He will. [86]

\* \* \*

Q. A few minutes ago, Mr. Royce asked you if you had observed any sticker on a windshield of that Packard automobile and you answered "No", and answered, I believe, that you had seen an owner's certificate in the car? A. I had, yes.

Q. Where was that certificate?

A. It was in the glove compartment.

Q. Did you observe whose name was on that certificate? A. The name was George LaClair.

Q. I don't quite understand how you knew that the car was in the garage there.

A. The first word that I received was from my office.

Q. When was that?

A. That was immediately prior to my leaving the hotel, I would say at 3:35.

(Testimony of Herbert Arlowe.)

Q. Leaving what hotel? [88]

A. The Benjamin Franklin Hotel.

Q. Was that before or after the arrest?

A. That was after the arrest.

Q. Why did you call the office?

A. I called the office to find out what had developed while I was at the Marshal's office.

Q. What was the interval of time, would you say, between the time you left the hotel to secure the warrant to the time you got over here to the Marshal's office?

A. I left the hotel at approximately 1:50 the first time. I left the hotel the first time to get the warrant. I proceeded to the United States Attorney's office.

Q. You arrived here about what time?

A. I can't say exactly, probably ten minutes later.

Q. How long did you remain in this building?

A. Until 3:10, 10 minutes after 3.

Q. That was 1:50 to 3:10?

A. 1:50 to 3:10.

Q. And then when did you leave this building?

A. At 3:10.

Q. Where did you proceed?

A. With Deputy Scully to Hotel Benjamin Franklin.

Q. You say that you phoned your office after you returned to the hotel?           A. That's right. [89]

(Testimony of Herbert Arlowe.)

Q. And after the arrest? What message did you receive from your office?

A. I received the message that the defendants had moved two pieces of luggage out of their room and that it had been taken to the Motor Ramp Garage.

Q. Is that the reason you proceeded to the Motor Ramp Garage? A. That is the reason.

Q. When Mr. Royce questioned you, you said that you also had gotten some information concerning that from somebody else in the hotel. Who was that?

A. I didn't receive that directly. That was given to my office.

Q. That was given to you?

A. That was from Mr. Standard.

Q. And that was the same message?

A. That was the same message.

Q. As you received from your office when you called? A. That's right.

Q. And the interval of time that elapsed from the time you left the hotel to the time you returned to the Benjamin Franklin Hotel, as I understand it, was 1:50 p.m. to what time?

A. I would say about 3:20.

Q. In other words, there was approximately an interval of about one hour and thirty minutes, is that correct [90]

A. 1:50 until 2, 2 to 3:20, it would be an hour and 40 minutes. An hour and 30 minutes, I believe.

(Testimony of Herbert Arlowe.)

Q. That is an approximation?

A. That is an approximation, yes.

Q. Did you say when Mr. Royce questioned you that you saw Mr. Donofrio at the garage?

A. I did, yes.

Q. What time of the day was that that you saw him there?

A. I would say approximately 3:40.

Q. Did I understand that you previously testified that Mr. Donofrio was in the room?

A. He was, yes.

Q. When? A. At the time of the arrest.

Q. Did you call the city police?

A. I did not.

Q. Were the police there at the garage when you arrived there?

A. As I remember it, there were two policemen in the garage, yes.

Q. Did the police remove any of this luggage from the car? A. They did not.

Q. Who did remove the luggage?

A. Mr. Ames took the luggage out of the back compartment. [91]

\* \* \*

Q. Did you ever make a test or order a test of this transmitter to be made? A. I did.

Q. What was the purpose of that test?

A. To determine whether it was operating on the frequency of the signal that we heard prior to that.

\* \* \*

(Testimony of Herbert Arlowe.)

Q. What was the frequency?

A. The accurate measurement was 3535.8 kilocycles.

Q. Was that the same measurement of the signals that you had been hearing?

A. Our previous measurements had been by a portable meter, which is not so accurate. It indicated 3536, accuracy, approximately one-half kilocycle.

Q. One-half of a kilocycle?

A. Approximately.

Q. In your opinion, based upon your tests, this was the same transmitter as used in the emission of those signals? [92]

A. Absolutely, it was the same transmitter.

\* \* \*

Q. Was there any equipment for transmitting code in this equipment that you seized?

A. There is no provision for transmitting code. There is no radio telegraph key, which would be necessary to transmit a code. [93]

\* \* \*

#### Cross-Examination

By Mr. Pomeroy:

Q. I mean, you have boards and commissions and hearings in regard to Federal Communications matters, do you not?

A. I have not. Did you say I have attended them?

Q. Have you? A. No, I never have.

Q. You presented a number of cases for prosecu-



(Testimony of Herbert Arlowe.)

tion, have you not, to the United States Attorney's office?

A. One in this district, one in San Francisco.

Q. Is that the only one you ever presented here?

A. That's right. [96]

\* \* \*

Mr. Royce: Yes, Your Honor. I would like to state to the Court that my objection to the evidence offered as to the records—at this time, we are also making a motion to strike all the oral testimony previously testified to by Mr. Arlowe and the other previous witnesses as to any broadcasts made by these defendants. The objection to the introduction of Plaintiff's Exhibit 7 and the motion to strike the previous testimony is based on Title 47, USCA, Sec. 605, and on the decided case of *Nardone vs. U. S.*, 302 U. S. 379. [102]

\* \* \*

Q. Mr. Arlowe, at or about the time that you allege these defendants were broadcasting over a frequency of approximately 3540 kilocycles, did your office have complaints of other broadcasting on other wave lengths, illegal broadcasting?

A. I think that is entirely beside the point because——

Mr. Pomeroy: If Your Honor please, I am asking that this witness——

The Court: That objection is sustained. The jury will disregard the witness' response. It is for the Court to determine whether it is beside the point or not.

A. No.

(Testimony of Herbert Arlowe.)

Q. You had no complaints of any other illegal broadcasting in this area, is that right?

A. We had no complaint that we were receiving at the time we were receiving these.

Q. Did you have any at approximately the same time? A. We had some prior to this time.

Q. How much prior?

A. About January 25, I would say.

Q. January 25 you had complaints of illegal broadcasting in this area, is that correct? [116]

A. No, in Everett.

Q. How many kilocycles was the band on which that broadcast was being made?

A. We never received any indication of the frequency that was on.

Q. You couldn't find that?

A. We never heard them.

Q. You never heard them? A. No.

Q. On February 2, didn't you testify in direct examination that you had a complaint on a broadcast over 3936?

A. We received that complaint, yes.

Q. Is that different than the January 25 complaints? A. Yes.

Q. What other complaints have you had? Over what other spots on this band did you have complaints at approximately this time?

A. No other.

Q. Referring back to my previous question, did you ever find out who had done the broadcasting from Everett? A. No.

(Testimony of Herbert Arlowe.)

Q. Did you make an investigation?

A. We started an investigation. [117]

\* \* \*

Q. In Everett? A. Yes.

Q. Was that transmitter similar to this transmitter which you have identified as being in Plaintiff's Exhibit 6?

A. I did not see that transmitter.

Q. Did you get a description of it?

A. We got a description.

Q. Does that description make it appear to you to be similar to this transmitter which you have identified in Plaintiff's Exhibit 6?

A. It would not be similar. [118]

\* \* \*

Q. You say that you heard more than one person speaking over whatever radio you were listening to? A. Yes.

Q. How many voices did you hear, different voices?

A. I would say two different voices.

Q. And as I recall, you said one had a peculiarity in speech? A. Yes.

Q. Describe what you mean by that.

A. In pronouncing the word "modulation," this one voice [120] always pronounced it "homodulation."

Q. Pronounced it what?

(Testimony of Herbert Arlowe.)

A. "Homodulation," instead of the word "modulation," he said "homodulation."

\* \* \*

A. The report I received from my engineer, Mr. Ames, indicated that the transmitter was located in the Benjamin Franklin Hotel.

Q. When did you receive that report?

A. I received that report when he returned from his investigation.

Q. When was that?

A. I would say approximately 3 to 4 o'clock.

Q. When? A. On the 7th.

Q. In the afternoon, p. m. or a. m.?

A. That would be in the afternoon.

Q. Then at the time you heard the broadcast between 12:30 and 1 you didn't know where it was coming from? A. No, I didn't.

Q. A report came to you later to determine that it came from the Benjamin Franklin Hotel, is that right? A. That is right. [124]

\* \* \*

Q. Then on February 10 you heard the broadcast again? A. I did.

Q. Where were you when you heard the broadcast on February 10?

A. When I first heard it, I was in the office, Room 810. [127]

Q. In the Federal Office Building, First and Marion? A. Yes.

(Testimony of Herbert Arlowe.)

Q. Then what did you do after first hearing that broadcast?

A. I again proceeded to the vicinity of the Benjamin Franklin Hotel and in the same manner traced the signal, noticed that it became stronger as I approached the hotel.

Q. Did you know when you left your office in the Federal Office Building what room in the Benjamin Franklin Hotel you were going to go to?

A. No.

Q. When did you first know that you were going to go to Room 1217 in the Benjamin Franklin Hotel on February 10?

A. Well, just a few minutes before I went there, about 1:40.

Q. Before you went to the room? A. Yes.

Q. Where were you when you first knew you were going to go to Room 1217?

A. The first indication—

Q. Where were you?

A. I was on the hotel lobby floor.

Q. Were you alone or with someone?

A. I was with someone.

Q. With whom were you?

A. I was with Joe Hallock and the telephone operator. [128]

Q. The telephone operator of the Benjamin Franklin Hotel?

A. Of the Benjamin Franklin Hotel, yes.

Q. Is it from the telephone operator at the Benjamin Franklin Hotel that you obtained the



(Testimony of Herbert Arlowe.)

room number, 1217, to which you were going?

A. May I say what I did obtain?

Q. I asked you the question.

A. Indirectly, yes.

Q. Well, how did you obtain that room number?

A. She supplied me with the information that long distance telephone calls were being direct to—

Q. She told you there were long distance telephone calls from this room?

A. No, to this room.

Q. Then what did you do after she told you this?

A. I proceeded immediately to the twelfth floor.

Q. Then what did you do?

A. I contacted Mr. Ames.

Q. You still had Mr. Hallock with you?

A. Mr. Hallock did not go up with me.

Q. Where did Mr. Hallock go?

A. I don't know.

Q. He was under your direction and supervision, wasn't he?      A. Yes.

Q. Where did you send him? [129]

A. I didn't send him anywhere at that time.

Q. Well, what were his instructions when you left him?      A. I didn't instruct him.

Q. You don't know where he went or what he did?      A. No, I do not.

Q. How long had you been with Mr. Hallock prior to that time, prior to the time you left him?

(Testimony of Herbert Arlowe.)

A. I was with Mr. Hallock in the hotel just a few minutes.

Q. Where had you met Mr. Hallock prior to the conversation with the telephone operator?

A. I had met him there at the hotel desk.

Q. And you went to the twelfth floor?

A. I did.

Q. And Mr. Hallock did not go with you?

A. He did not.

Q. And he had no instructions?

A. That is right.

Q. You did not know what he was going to do?

A. I did not.

Q. Is that normal procedure for your department, just leave the man there when you are going up to this place?

A. Mr. Hallock and Mr. Ames were assigned to help me find the room. They had been operating in the car, in the other mobile unit.

Q. Then you went up to the twelfth floor? [130]

A. I did.

Q. Who was on the twelfth floor?

A. Mr. Ames.

Q. Had he been sent there at your direction?

A. He had not.

Q. How long had he been on the twelfth floor?

A. I wouldn't say, probably a few minutes.

Q. Did he know prior to that time that you were going to go to Room 1217?

A. He did not, as far as I know.

Q. What was he doing on the twelfth floor?

(Testimony of Herbert Arlowe.)

A. He was using his little receiver.

Q. And then you went directly to Room 1217?

A. I did not go directly, no.

Q. What did you do between the time you got off the elevator on the twelfth floor and the time you arrived in Room 1217?

A. I waited with Mr. Ames.

Q. Waited where?

A. Waited in the stairway. I don't know what you would call it, the stairway is closed off. I waited in there.

Q. What were you waiting for?

A. Waiting for the signal to come back on.

Q. How long did you wait there?

A. One or two minutes. [131]

Q. Then what did you do?

A. When we heard the signal, we walked out into the hallway.

Q. Then what did you do?

A. I stayed with him, and when we walked by Room 1217 the signal in his receiver was the strongest, and I heard the voices through the door.

Q. That was approximately what time?

A. 1:46.

Q. 1:46 p.m. on— A. February 10.

Q. Then what did you do and where did you go?

A. I immediately returned to the ground floor of the hotel and proceeded to the United States Commissioner's Office or the United States District Attorney's office.

(Testimony of Herbert Arlowe.)

Q. Where did Mr. Ames go?

A. I do not know of my own knowledge.

Q. Where did you leave him?

A. I left him on the ground floor.

Q. In the lobby of the Benjamin Franklin?

A. That is correct.

Q. Was Mr. Hallock there when you came down?

A. I think he was.

Q. So Mr. Ames and Mr. Hallock were left in the lobby of the hotel at 1:46 p.m. and you went over to the United States [132] Attorney's office?

A. That is right.

Q. What was the next time you returned to the Benjamin Franklin Hotel?

A. I would say approximately 3:20.

Q. About 3:20 p.m., and you were with Deputy Marshal Edward Scully at that time?

A. Correct.

Q. Just the two of you, is that right?

A. There was a Mr. Wood that drove us over, but he did not enter the hotel immediately.

Q. Mr. Wood is the man who drives you?

A. From my office.

Q. When did you next see Ames and Hallock?

A. While I was in Room 1217, Mr. Ames came back up there.

Q. Mr. Ames came back up to Room 1217?

A. Yes.

Q. Between 1:46 and 3:20 p.m., you were sitting around the United States Court House, is that

(Testimony of Herbert Arlowe.)

right, waiting for the United States Attorney, for the United States Commissioner and for a deputy United States Marshal, is that right?

A. I was doing everything in my power to find the United States Commissioner.

Q. You didn't draft the complaint, did you?

A. I did. [133]

Q. You drafted it, wrote it up yourself?

A. I drafted it and the United States Attorney's office wrote it for me.

Q. While they were writing up your complaint for you, you were sitting around waiting, is that right?

A. Until the complaint was written, yes.

Q. Then you tried to get hold of the United States Commissioner and you were sitting waiting for him, is that right?

A. Yes.

Q. And then you went down to the Marshal's office, and you were sitting and waiting for the deputy United States Marshal?

A. A short wait, yes.

Q. And you arrived back at the Benjamin Franklin Hotel at 3:20 p.m.?

A. Yes.

Q. You did not call your office at any time during the time you were sitting around waiting up here?

A. I did, yes.

Q. When did you call your office?

A. It was probably about 2:45.

Q. Was that the only call you made to your office?



(Testimony of Herbert Arlowe.)

A. I wish to correct that. I don't believe that I called the office, I think the office called me. [134]

Q. Where were you when they called you?

A. I was probably in the United States Attorney's office.

Q. You were probably in the United States Attorney's office? You didn't have your complaint written yet?

A. Yes, the complaint was written. We were waiting for the United States Commissioner.

Q. You were waiting in the United States Attorney's office?

A. I was up there at that moment. I was back and forth. I was over the building. I think you have the wrong impression that I was sitting in the office.

Q. What were you doing going over the building?

A. Looking for the commissioner.

Q. Where did you look?

A. In the halls.

Q. How many halls, all ten floors?

A. I walked up the stairway from the sixth to the tenth.

Q. Did you expect to see the commissioner in the stairway between the sixth and tenth floors?

A. I expected to find him in the men's room at first. Nobody had any explanation of where he was. His office was open and he was out.

Q. Your office called you at 2:45, is that right?

A. I would say approximately that time.

Q. And did that conversation that you had with

(Testimony of Herbert Arlowe.)

your office — with whom in your office did you have a conversation? [135]      A. Mr. Wiltse.

Q. What capacity does he have in your office?

A. He is regional manager.

Q. Is he your superior?

A. Yes, in a sense.

Q. Did you have a conversation with him relative to this case that you were then on?

A. I did.

Q. Tell the Court what that conversation was.

A. He told me that the hotel manager had advised him that the defendants were checking out.

Q. Did he say who that hotel manager was?

A. Mr. Standard, assistant manager.

Q. Did he say anything else to you concerning their checking out?

A. He said, "Do everything you can to hurry the issuance of the warrants."

Q. Was anything said about any bags leaving that room?      A. Yes, there was.

Q. State what that was.

A. As I remember, he said that they were checking out, they were bringing down some bags.

Q. Mr. Standard had told him they were checking out and they had brought down some bags?

A. They were bringing down some bags. [136]

Q. Is that all the conversation there was in that telephone conversation?      A. I believe so.

Q. At that time, you had not seen the United States Commissioner?      A. That is correct.

(Testimony of Herbert Arlowe.)

Q. At 3:20 when you arrived back in the Benjamin Franklin Hotel, you and Mr. Scully, what did you do after you entered the lobby of the Benjamin Franklin Hotel?

A. I went immediately to the twelfth floor.

Q. And what occurred there?

A. Mr. Scully arrested the three defendants.

Q. Well, you went to room 1217? A. Yes.

Q. And did you knock on the door or how did you get in the room?

A. Mr. Scully knocked on the door.

Q. And you were right behind Mr. Scully, is that right? A. I was. [137]

\* \* \*

Q. What were you doing during this time?

A. I was looking around the room.

Q. What do you mean by that? Tell us what you did by looking around the room. Did you stand in one place, cast your eyes around, or did you move around, or what did you do?

A. I moved around, looked in closets, looked in the different rooms.

Q. In other words, you conducted a search of the premises, is that right?

A. Whatever you would call it.

Q. I am asking, is that what you would call it?

A. I wouldn't call it a very thorough search.

Q. Was it or was it not?

A. It was a search sufficient to satisfy me whether the transmitter was there.

(Testimony of Herbert Arlowe.)

Q. You were looking for the transmitter, is that right?      A. I was.

Q. And you didn't find a transmitter?

A. I didn't find a transmitter.

Q. Where did you go from that room?

A. Back to the main floor of the hotel.

Q. Did you go alone or did you go with someone from Room [139] 1217 down to the lobby of the Benjamin Franklin Hotel?

A. I went with someone.

\* \* \*

Q. Was it while you were conducting this search of the room that Mr. Ames came in?

A. He did.

\* \* \*

Q. Did you have a conversation with him?

A. Yes, I did.

Q. Did he have a conversation with anyone else in that room when he first came in there?

\* \* \*

A. I don't think so.

Q. Was the only conversation that Mr. Ames had with anyone, with you at this time in this room? [140]

A. So far as I know, yes.

Q. Tell the Court and jury what that conversation was.

A. I was talking on the telephone at the time.

Q. With whom were you talking on the telephone?      A. My office.

(Testimony of Herbert Arlowe.)

Q. You called your office again?

A. From the room.

Q. While you were talking on the telephone, Mr. Ames came in?      A. I think so, yes.

Q. Did this telephone conversation with your office take place before or after you made this search?      A. After.

Q. After you made the search and determined the transmitter wasn't there, did you call your office or did your office call you?

A. I called the office.

Q. To whom did you talk there?

A. Mr. Wiltse.

Q. What was that conversation?

A. I told him that I could not find the transmitter, and he said that it must be in the baggage that was removed from the rooms and taken to the Motor Ramp Garage.

Q. Did you know how he found out that anything had been sent to the Motor Ramp Garage?

A. Only that he said Mr. Standard told him.

Q. When did Mr. Standard tell him that? Was that before or after your first conversation?

A. I don't know; it was probably before.

Q. Probably before your first conversation with Mr. Wiltse?      A. Yes.

Q. So then while you were on the phone Mr. Ames came in?      A. Yes.

Q. Did you speak with Mr. Ames during that conversation that you had with Mr. Wiltse or after you finished talking with Mr. Wiltse?



(Testimony of Herbert Arlowe.)

A. After I finished talking.

Q. Mr. Ames was standing there when you hung up the telephone?      A. Correct.

Q. Then what conversation did you have with Mr. Ames?

A. He said, "The equipment is in the Packard car at the Motor Ramp Garage." [142]

\* \* \*

Q. Referring back to your leaving Room 1217 with Mr. Ames, where did you go?

A. I went to the lobby of the hotel. [144]

\* \* \*

Q. Then you went to the Motor Ramp Garage?

A. Yes.

Q. Just you and Mr. Ames went to the Motor Ramp Garage?      A. We went together.

Q. Where did you go in that garage?

A. We went to the basement.

Q. How did you know where to go when you reached the Motor Ramp Garage? How did you know to go to the basement?

A. I don't recall now, but I believe I asked the attendant at the door of the garage.

Q. Didn't Mr. Ames know where to go?

A. Yes, he did.

Q. Then why did you have to ask the attendant at the door?

A. I said I didn't remember.

Q. Did you or did you not ask the attendant?

(Testimony of Herbert Arlowe.)

A. I won't say whether I did or not. I can't remember. If I didn't, then I didn't.

Q. Then Mr. Ames knew where you were going, down in the basement of the garage?

A. Yes.

Q. When you got down in the basement of the garage, what persons, if any, did you find down there? [145]

A. Mr. Hallock.

Q. Mr. Hallock is one of the other employees of your office?

A. He is.

Q. And who else did you find down there?

A. I can't say whether the garage attendant was at the car at this time.

Q. He may or may not have been there, is that right?

A. That is right.

Q. Was there anyone else?

A. There were two policemen farther away.

Q. Two members of the Seattle Police Department?

A. As I remember, yes.

Q. They were where?

A. They were farther away. I didn't notice them at first, but they were farther away in the garage.

Q. They were farther away in the garage?

A. Yes.

Q. Did they have a Seattle police prowler car down there?

A. No.

Q. They didn't?

A. I didn't see any.

Q. You don't know whether they did or not, do you?

A. No.

(Testimony of Herbert Arlowe.)

Q. Was there anyone else you know of down in the basement of the garage at that time? [146]

A. There was Joseph Donofrio, but I believe that he came shortly afterward.

Q. You think he came down after?

A. I believe so.

Q. Was there anyone else?

A. I believe that Mr. Wood came a little bit later.

Q. Who is Mr. Wood?

A. He is also in my office.

Q. He came down a little bit later?

A. He is the driver, the one that drove my car.

Q. Is there anyone else now?

A. You have Mr. Ames, Mr. Hallock and Mr. Donofrio. I don't recall anyone else.

Q. The two policemen? A. Yes.

Q. And the attendant, maybe? A. Yes.

\* \* \*

Q. After you arrived and these people were there, what happened? [147]

A. I asked the attendant to open the back of the car.

Q. How did you know there was anything in the back of the car?

A. Because Mr. Ames had told me the transmitter was there.

Q. When did he tell you that?

(Testimony of Herbert Arlowe.)

A. Either in the hotel room, or from the hotel room down to the garage.

Q. He said the transmitter was in this automobile in the basement of the Motor Ramp Garage?

A. He did.

Q. So you went down and told the attendant to open the Packard automobile, is that right?

A. I did.

Q. Did Mr. Ames tell you how he knew it was there? A. He has told me, yes.

Q. How did he know it was there?

A. Do you want me to repeat what he has told?

Q. That is what I am asking for.

A. He told me when he first found the car in the garage that he asked the attendant to open the back, after he had been informed by the attendant that the attendant had put two bags in the back of the car.

Q. Then he asked the attendant to open the back of the car? A. Yes.

Q. And he had seen these two bags? [148]

A. No, he did not obtain them. He had seen them in there.

Q. So that is what he told you and then you came down? A. That is right. [149]

\* \* \*

Q. When you were in the United States Court House prior to leaving to go and arrest the defendants, did you ask the United States Commissioner for a search warrant?

(Testimony of Herbert Arlowe.)

A. I proceeded to the—

Q. I asked a question as to whether or not when you were in the United States Court House waiting for the Commissioner and getting a warrant from the Commissioner, did you ask him also for a search warrant?      A. No, I did not.

Q. Did you ever at any proceedings in this case have a search warrant?      A. I did not. [150]

\* \* \*

Q. Does this equipment work?

A. The transmitter we tested, and it does work satisfactorily. [153]

\* \* \*

#### Redirect Examination

Q. (By Mr. Dore): You say you have never tested the receiver?

A. Never tested the receiver, we don't know whether it will work or not.

Q. You have tested the transmitter?

A. We have tested the transmitter. It will radiate a signal from here into Oregon.

Mr. Dore: That is all.

#### Recross Examination

Q. (By Mr. Pomeroy): What test did you use on February 15?

A. We wanted to test the transmitter to see whether the frequency was the same as the signal we had heard during the [158] investigation.



(Testimony of Herbert Arlowe.)

Q. How did you test that?

A. We measured with equipment in our office while it was operating. We also asked our monitoring station in Portland, Oregon, to measure. The results were exactly the same.

\* \* \*

JOHN W. WATSON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dore:

Q. What were you ordered to do, and when and where?

A. Approximately February 15 I was ordered to test the transmitter which had been placed in my possession at this time, and perform a test to determine that the transmitter was functioning properly and that it was capable of radiating a signal.

Q. Was it so capable?

A. It was found to be so.

Q. Was it functioning properly on that day?

A. Yes, it was. [184]

\* \* \*

Q. I might ask you again whether you recall any names on any of the broadcast messages intercepted?

A. Yes, I do. I do not recall the exact dates on which I heard them. [185]

(Testimony of John W. Watson.)

Q. What names do you recall?

A. I recall hearing names; Ralph, Joe, Plesa and Casey.

Q. Did you hear any message broadcast concerning tailor? A. Yes, I did.

Q. What message was that?

A. As I recall, the message stated something to the effect that the tailor was coming and that there was something about ordering 20 or 40. [186]

\* \* \*

### PATRICIA H. JAMES

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Evans:

\* \* \*

Q. Where are you employed?

A. I am employed with the Federal Communications Commission.

Q. In what capacity?

A. As a stenographer, general office worker, stenographer.

Q. Were you so employed during the months of January and February of this year?

A. Yes, I was. [192]

\* \* \*

Mr. Evans: I believe her testimony is, Your

(Testimony of Patricia H. James.)

Honor, that on the 3rd, 4th, and 5th she transcribed in her shorthand books from dictaphone records. As to the 7th, I believe she testified she took her notes directly from hearing it on the radio.

\* \* \*

Q. Who else was present on the 7th at the time you were listening to this broadcast?

A. Mr. Watson. [194]

\* \* \*

Q. Directing your attention to the 7th of February, do you recall approximately the time that the station came on the air?

A. Around noontime, possibly a little later.

Q. How long did it continue on the air before it was off for the day, as far as you know, approximately?

A. I really don't know. It was on and off.

Q. Did that continue for an hour, two hours, three hours?

A. Yes, about two hours, I think.

Q. During this broadcast, I will ask you to state whether [195] or not you heard any names mentioned? A. Yes, on the 7th I did.

Q. What were those names?

A. One name was Edward, and Casey, and Plesa.

Q. Just relate as nearly as you can remember what you heard along about 2 o'clock, if you can get the time down sometime in that period.

A. At that time apparently they were testing to

(Testimony of Patricia H. James.)

see if the receivers worked. That was the impression I gathered from the broadcast.

Q. Just tell us what you heard.

A. The person who was broadcasting said, "Can you hear me, raise your hand, raise both your hands if you can hear," and directed them to cross the street.

Q. Did he use any names in connection with crossing the street?

A. Yes, Casey and Edward.

Q. Did he use the name Edward or Eddie?

A. No, Edward in this particular instance. Do you want me to continue on with that?

Q. Will you, please?

A. He asked them to cross the street and go toward the river, and apparently there was a red light on at the time, and said, "Don't pay any attention to red lights. What's a red light when there is so much at stake. What's at stake, [196] a whole shoe box full." That's not verbatim but—

Q. You said something about a box?

A. A shoe box full, and he also mentioned the tailor coming up and asked them to wait on that same side of the street. [197]

\* \* \*

Q. Did you carry out any such functions as this that you have spoken of on the 8th day of February, 1949?

A. We didn't hear anything on the 8th.

Q. On the 9th of February, 1949? A. Yes.

(Testimony of Patricia H. James.)

Q. Can you recall generally about how long the station was on the air on that day?

A. Quite a while, I think it was two or three hours at least; intermittently, of course.

Q. Will you relate as nearly as you can remember what you heard on the 9th?

A. Well, there wasn't so much testing, and they mentioned Fair Grounds and Hialeah race tracks, and they mentioned horses. In one instance, there was a photo finish between a No. 1 horse, and 6, and the advice given was to bet, "You can't lose," and the words, "bet, bet" were repeated several times. Several races were broadcast. The results of races were given that day.

Q. Do you recall what the nature of the broadcast was on the 9th in regard to horse racing; that is, was there anything that indicated a report of the actual running of a race?

A. Yes. The words, "At the post, running, at the quarter, and half," and telling what horse was ahead and what [198] was running second, as I recall.

Q. I will ask you whether or not the word "Fair Grounds" was heard at any time?      A. Yes.

Q. I will ask you whether or not you recall anything about "Fair Grounds" being the winner?

A. No, I don't.

Mr. Pomeroy: Fair Grounds is the name of a track. [199]

\* \* \*



(Testimony of Patricia H. James.)

Q. Do you recall approximately the time that this station [200] came on the air on February 9, 1949?

A. It was around 1 o'clock, I believe.

\* \* \*

Q. Just tell us as nearly as you can remember what you heard on that broadcast.

A. Well, there was some testing, not a great deal, mostly "Testing, one, two, three, four," and Fair Grounds was mentioned, post time at Fair Grounds, or post is forty, some expression of that sort, and the winner at Hialeah in one particular race, I believe it was a photo finish, and advice was given to bet on horse No. 1 and 6. Then a winner at Fairgrounds was mentioned, but not by name, just No. 5.

Q. How was the winner mentioned?

A. As No. 5.

Q. I will ask you whether or not during the course of these broadcasts in regard to races there was any running account as to the progress of the race?

A. Yes, there was, at Hialeah. I don't remember the exact expression used, but the gist of it was that 1, 6 and 7 were running, and they mentioned the quarter and the half and the stretch, I believe, I am not positive about that. [201]

\* \* \*

Q. As to the broadcast on the 7th of February about which you testified yesterday, was there any-

(Testimony of Patricia H. James.)

thing peculiar about the voice so far as you were able to distinguish?

A. Well, I wouldn't say it was peculiar, but I would say I recognized it as probably someone who had spent a good deal of time on the Eastern Seaboard, around New York or New Jersey. I lived there a good many years myself, and I don't think very many people in the country speak with that inflection in their voice, or manner of pronunciation. [202]

\* \* \*

Q. On February 10, 1949, did you listen to any broadcasts? A. Yes, I did.

Q. Who was with you at that time?

A. Mr. Watson.

Q. Is this the same broadcast which he testified to here? A. Yes, it was.

Q. Do you recall approximately what time that came on the air February 10?

A. I believe it was shortly after 1, around 1 o'clock.

Q. About how long did they stay on the air?

A. A little less than an hour.

Q. Just tell us what you can remember as to the broadcast you heard on the 10th of February, 1949.

A. It was fairly brief. The broadcast didn't continue for the whole hour. There was several short periods of [203] testing, and one race at Santa Anita was mentioned. No. 10, Toman, I

(Testimony of Patricia H. James.)

believe it was, was mentioned as the winner, and after that there were no more transmissions.

Q. Would you state who was the winner in this particular race?      A. Toman.

\* \* \*

Q. Do you recall what you read as to the winner in the second race at Santa Anita, from the newspaper?

A. Well, I really can't say definitely that it was the [204] second race, but I did compare my——

Mr. Pomeroy: Just a moment. It isn't responsive. It calls for a yes or no answer.

The Court: The objection is sustained.

Q. Will you state whether from consulting the newspaper you found any place in the Santa Anita race where Toman was the winner?      A. Yes.

Mr. Pomeroy: Counsel knows much better than to ask a question like that. That is the simplest kind of evidence. That is the best evidence. Bring the paper in here. We would like to see it, too. I object to it on the ground it isn't the best evidence, and he knows that.

The Court: Sustained.

(Newspaper clipping marked Plaintiff's Exhibit 8 for Identification.)

Q. You have been handed what has been marked for identification as Plaintiff's Exhibit 8. Will you state whether or not you can identify it, without revealing the contents?

(Testimony of Patricia H. James.)

A. Whether I can identify it without revealing the contents? Yes.

Q. Will you state what it is?

A. It is a clipping from the P.I. for the following day, for the 11th. [205]

\* \* \*

### EVERETT AMES

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [216]

#### Direct Examination

By Mr. Dore:

Q. State your full name, please?

A. Everett Keith Ames.

Q. How do you spell your last name?

A. A-m-e-s.

Q. Where do you live?

A. 7010 54th Avenue N.E. in Seattle. [217]

\* \* \*

Q. Where are you now employed?

A. I am employed by the Federal Communications Commission as a radio engineer, investigator.

Q. Were you so employed on or about February 3, 4 or 5, 1949? A. I was. [218]

\* \* \*

Q. I will ask you whether you were assigned to the investigation of this case? A. I was.

(Testimony of Everett Ames.)

Q. On what date and by whom?

A. I would say I was assigned at the instant the telephone call that I received from Auckland that was complaining of this case.

Q. What was that date?

A. That was on February 2, Wednesday.

Q. In other words, did you receive the original complaint call?      A. I did.

Q. From whom was that call made, did you say?

A. Herbert Auckland, a radio amateur.

\* \* \*

Q. What time of day was that that you received that call?

A. Probably in the neighborhood of 4 o'clock, or 3:30, I am not too positive. [219]

\* \* \*

Q. What was the nature of the complaint?

A. Auckland stated in the neighborhood of 1 p.m. or 1:15, while driving to work, he heard these voices on his radio in his car. He has an amateur radio station and I believe at that time he had a transmitter in his car.

Q. Was there any description of the band of operation at that time to you?

A. Yes. He told me that it was on the 80-meter band, the phone portion, at a frequency in the neighborhood of 3920 to 4000, that he could not accurately determine the frequency.

Q. In common parlance, in what band is that?



(Testimony of Everett Ames.)

A. That is the band that is set aside for radio telephony communication, or voice communication.

Q. Is that commonly known as, we have been discussing it as the amateur band, or is it another band?

A. It is the amateur band as we have been discussing it.

Q. What did you do pursuant to that complaint?

A. I immediately turned on the receiver in our office, [220] in Room 810, tuned to that frequency.

\* \* \*

Q. Did you on February 3 hear any voices over the receiver?      A. Yes, I did.

Q. Was that an illegal broadcast on that day?

A. Yes, it very definitely was.

Q. What did you hear at that time?

A. At that time, I heard such transmissions as, "Testing, testing, one, two, three, four, testing, one, two, three, four." That was repeated any number of times. I also heard, "Do you hear me, Eddie, do you hear me, Eddie, if you hear me, raise your hand." That was repeated probably a few times as well. [221]

\* \* \*

Q. Did you do anything by way of investigation other than tuning in on the receiver that day?

A. Yes. At the time I heard that, I was in the mobile unit, which is our name for an investigative

(Testimony of Everett Ames.)

car which contained receivers, and I heard everything on that receiver in the car.

Q. Is that the car that also contains a radio direction finder loop?      A. Yes, it is.

Q. Is that the car used in your standard procedure of direction finding technique of the department?      A. Yes.

Q. Just tell the Court and jury what you then did.

A. I wasn't driving the car. I was in the back of the [222] car where the receiver is.

Q. Who was driving?

A. Engineer Hallock of our office.

Q. Go ahead.

A. At that time I had already had the receiver tuned in, so I took a loop bearing and then we proceeded to another location to take a second bearing, to get a cross on that. Actually, we took three or four bearings.

Q. Did you plot those bearings in?

A. Yes, we plotted those bearings.

Q. Were you able to fix any location as to the epicenter of these transmissions?

A. Yes. We picked a location in the vicinity of Western Avenue or First Avenue and Stewart and Virginia.

Q. Could you fix that location any more definitely than by streets?      A. Yes, we can.

Q. What did you do subsequently to that?

(Testimony of Everett Ames.)

A. That occupied practically the whole day, I mean all of the time I heard the transmission.

Q. That was during the 4th?

A. No, that was the 3rd.

Q. What did you do by way of investigation on the 4th?

A. On the 4th, we were again listening and we did not hear the signal. [223]

Q. Who do you mean by we?

A. Engineer Hallock and myself in the investigative car.

Q. Go ahead.

A. We did not hear the signal on the frequency we had heard it on the previous day, that is 3936.

Q. Did you hear any unlawful transmission that day?

A. Yes, we heard the signal come in on 3536 kilocycles.

Q. Is that within the amateur band?

A. That is not within the voice portion of the amateur band; however, it is within the code portion of the band.

Q. Was this signal that you heard a voice signal?

A. Yes, sir, it was a voice signal.

Q. How do you explain it was in the code band?

A. I don't know why it was there. It was there.

Q. Would you explain to me and the jury and Court and counsel how that possibly could be, that these readings would be within the amateur band and yet, as you say, they were voice signals but they were in the code band?

(Testimony of Everett Ames.)

A. Well, my interpretation at the time was that it was obviously an unlicensed or illegal station at that time.

Q. In other words, the voice band extends from where to where in kilocycles?

A. The voice band extends from 3850 kilocycles to 4000 kilocycles.

Q. What bands are reserved for code communication? [224]

A. The code communications can be anywhere from 3500 to 4000 kilocycles.

Q. How do you distinguish the two?

A. Well, the code is dots and dashes. The voice is actual voice, I mean, you could hear the person talking, audio signals.

Q. Was there any identification of the station on February 4?      A. No, sir.

Q. Any procedure of identification?

A. I don't understand the question.

Q. Any procedure of identification?

A. There wasn't any identification used.

Q. How many voices did you hear on that day?

A. I heard one voice.

Q. Male or female?      A. Male voice. [225]

\* \* \*

Q. What did you hear as to language in the message on February 4?

A. On February 4—

Q. If you recall.

A. I heard such phrases as, "Testing, one, two, three, four" and then I heard one transmission

(Testimony of Everett Ames.)

whereby—I might state that these transmissions were on and off at different times—I heard one transmission whereby they announced that information was coming from Santa Anita. I heard phrases such as “They are running at Santa Anita.”

Q. Did you hear any personal names mentioned that day?

A. No, I did not. I heard other information to the effect that the race was a photofinish, a three-horse photofinish, “They hit the wire together,” or something to that effect.

Q. Can you set the time approximately on the 4th that you heard these signals?

A. No, I did not.

Q. Was it in the morning or afternoon?

A. It was between the times, approximately, 12:30 until 3 p.m., the exact time I didn't have. I also heard another result of a race whereby they mentioned the winner as being Manzanito, and there was another race result giving Newsworthy as the winner. Actually, it didn't win the race, though.

\* \* \*

Q. What else did you do by way of investigation on February 4?

A. On February 4, immediately on hearing the signal, we proceeded in the car along Elliott Way south, taking bearings approximately each block as we could line them up with the streets on the other side of Western Avenue. I believe we took about five or six bearings. Those bearings indi-



(Testimony of Everett Ames.)

cated that the signal was not in the same location that it was on the previous day.

Q. Did you plot in those bearings?

A. We plotted in the bearings. Due to the nature of the bearings, they were rather dispersed but it did give us an area in the vicinity of Third and Fourth Avenues bounded by Seneca Street.

\* \* \*

Q. On February 5, what did you do by way of investigation of the case? Who was with you? What did you do? Where did you go?

A. On February 5, that is Saturday, on February 5 we were again at the receiver.

Q. When you speak of we, would you please set out who you mean by we?

A. I would like to retract that. On February 5, I was in the office at the time the signal first came on. Engineer Hallock and I then immediately went downstairs to our garage in the same building and we then proceeded in the mobile unit out on the street. We picked up the broadcast immediately on coming out of the garage.

Q. What time?

A. Probably about 1 o'clock.

Q. One o'clock in the afternoon?

A. In the afternoon.

Q. You say you proceeded with your directional equipment in the car?      A. Yes, sir.

Q. Then what did you do? Where did you go?

A. We then made S meter runs. We did not take loop bearings.

(Testimony of Everett Ames.)

Q. What do you mean by S meter runs?

A. On the receiver, there is a meter which indicates the intensity of the signal being picked up, and it was commonly called an S meter. I believe the S would probably stand for signal strength, and the procedure there is——

Q. Would you explain the equipment briefly? Just give us a brief picture.

A. We use the radio receiver. It is called a Hallicrafter SX28, which is the type. It is a large receiver and it contains this small meter on the front. It is calibrated in decibels, or S readings.

Q. Is there other attached equipment to that receiver?

A. The receiver is self-contained, with the exception of the loudspeaker, and of course the loop we had attached at times; other times, we didn't.

Q. For what purpose do you use that receiver?

A. The receiver is used for the reception of any radio signals, and it is used extensively, well, for monitoring purposes or investigative purposes.

Q. That is mounted in the car, is it?

A. It is sitting on a table in the car, held in place by a strap.

Q. What did you do? [229]

A. We took these S meter runs. We took them heading east and also west on Seneca. We took them on Third and Fourth Avenues, that is, heading north and south.

Q. What were your results of your S meter runs?

(Testimony of Everett Ames.)

A. The S meter runs, all four of them, indicated the source of the signal to be at the intersection of Third and Seneca, or very close to that intersection.

Q. Is there any landmark there that you could make more clear for us?

A. From my extension at that time, I believed it to be the Hotel Stratford.

Q. Were you able with that S meter reading—are you able to ascertain whether a transmitter transmitting radio energy is located high or low above the ground?

A. That would depend a lot on the experience of the operator. Sometimes you can. A good operator can determine whether or not it is high above, if he is passing right along the street in front of the building it might be in.

Q. How much experience have you had with this type of S meter operation?

A. I have used them for several years, probably about three or four years.

Q. How many cases have you investigated?

A. Probably 30 or 40 where I have used that equipment or similar equipment. [230]

\* \* \*

Q. What messages did you hear over the air that day through your receiver?

A. I heard phrases such as "Testing, one, two, three, four, testing for modulation," and something to the effect that "I have asked for the results of the first race to be given." I then heard the re-

(Testimony of Everett Ames.)

sults of four races whereby the winners were announced each time.

Q. Was it a man's voice or a woman's voice?

A. A man's voice.

Q. Was it a one-way or two-way signal?

A. It was a one-way signal. There was no answer or any attempt to get an answer.

Q. Was there any procedure of identification?

A. There was none at all. [231]

Q. Was there any identification?

A. None at all.

Q. Were there any personal names used in the messages that day?

A. No, I didn't hear any personal names.

\* \* \*

Q. I will direct your attention to February 6 and ask if you made any investigation on that day? I believe the 6th would be Sunday.

A. February 6th was on Sunday. I did not.

Q. On February 7th, what did you do by way of investigation?

A. On February 7th, Engineer Hallock and myself were again in the car, Hallock driving. I was operating the receiver, and we again picked up the signals on 3536 kilocycles.

Q. What else did you do?

A. We took a bearing and immediately realized that the station had moved and was in a different hotel.

Q. Why did you realize that? How did you realize it?

(Testimony of Everett Ames.)

Mr. Pomeroy: What date is this?

Mr. Dore: February 7th.

Q. You say that you immediately realized that the source of transmission had been moved from the day previous, or the [232] 5th. What caused you to arrive at that conclusion?

A. The first act that I did was to take a loop bearing on the station from a spot that was clear, where I knew the bearing would be valid, and the bearing did not indicate in the direction of the Stratford Hotel.

Q. What did you do after taking that bearing and arriving at that conclusion?

A. We then took other bearings to pinpoint it.

Q. How many bearings would you say you took?

A. Probably three or four.

Q. Is that the standard procedure and method?

A. Yes.

Q. What did you locate at that time?

A. We located the Benjamin Franklin Hotel as being the source of the signal.

Q. That was on the 7th?

A. On the 7th.

Q. Did you use any S meter readings on that day?

A. Yes, we did. We used several of them. [233]

\* \* \*

Q. During what time was this?

A. Approximately 12:30 to 3.

Q. On what band?



(Testimony of Everett Ames.)

A. 3536 kilocycles, in the amateur band.

\* \* \*

Q. Was there any method or procedure of identification?

A. No, there was no procedure of identification, although I did hear names mentioned. I wouldn't say it was a directed [235] message.

Q. What names did you hear mentioned?

A. I heard the names, "Plesa, Casey."

Q. Do you recall the more exact language of the message concerning those names?

A. "Plesa, Casey, raise your hand if you hear me." I heard several transmissions of "Raise your hand, do a jig, Casey."

Q. Did you hear any other names mentioned?

A. No, sir.

Q. Would you say that the procedure and method of transmission that day was similar to the other days?

A. Quite similar, except there was no race track information given.

Q. Did you on the 3rd of February, 1949, or the 4th, 5th, 6th or 7th see any of the three defendants seated here at my right?

A. I don't recall seeing them.

Q. I will now direct your attention to February 8th and ask you if you proceeded with your investigation on that day?

A. Well, we attempted to, but we did not hear any signals.

(Testimony of Everett Ames.)

Q. Directing your attention to February 9th, what did you do in your investigation?

A. On February 9th, the procedure was quite similar. Engineer Hallock was driving, I was in the back of the car [236] taking bearings. We did hear a signal on 3536.

Q. What time was that?

A. In the neighborhood of 12:30.

Q. In the afternoon?

A. Yes, in the afternoon.

Q. On what band or frequency did you intercept this message?

A. In the amateur band, actual frequency, 3536 kilocycles.

Q. That was the same kilocycle reading as on the 7th, is that correct?

A. It wasn't only the same kilocycle reading, but the same vernier dial setting in each case, which would pinpoint it much more accurately.

Q. You are beyond me there. Could you explain what you mean by a vernier dial reading?

A. We have a dial on the set. It has a very slow motion, and it can be very accurately read or calibrated. It is such that if you take the number of that dial reading and at a later date come back to it, you will get the same frequency to within a very accurate degree, I would say about a quarter of one per cent. [237]

\* \* \*

Q. You were speaking of a dial vernier reading and explaining the meaning of that.

(Testimony of Everett Ames.)

A. I was trying to point out that the dial vernier was left set at the same place on the receiver dial, and from one day to the next the signal came on without any manipulating of the receiver, and also that the receiver is capable of holding that frequency very accurately, I would say within a quarter of one per cent, approximately.

Q. Is that a standard method and procedure in investigation?      A. Yes, sir.

Q. And by the use of that vernier dial, what was your finding?

A. Well, I could say definitely that the receiver—I should say that the transmitter was on the same frequency each of those days, that I did not have to adjust the receiver at all to pick it up from one day to the next, which would tie in pretty well that it was the same transmitter.

Q. What did you do after receiving these dial vernier readings?

A. Well, that was just the reading on the dial. I just verified that it was the same each day. [238]

\* \* \*

Q. As a result of the vernier dial readings, were you able to locate the center of transmission?

A. Not that vernier dial, because that wouldn't give me [240] the center; however, by the loop scale, yes, in other words, by the loop readings I could fix it very definitely.

Q. Did you fix it?

A. I did fix it to the Benjamin Franklin Hotel.

\* \* \*

(Testimony of Everett Ames.)

Q. Before we get the story out of order, you say you proceeded up from floor to floor?

A. Yes, sir.

Q. You say you did that the first time. Was there another time other than the first time?

A. I went up and down, I guess, two or three times that day.

Q. Between what hours, would you say?

A. Between 1 and 1:30—I don't know what time it was. It was in the afternoon, roughly around 2 o'clock, let's say.

Q. Did you find any results from your investigation with your receiver that day?

A. No, I did not. [242]

\* \* \*

Q. Did you on February 9 hear any other illegal transmissions other than these that you referred to? A. No, I did not.

Q. Would it have been possible with the equipment that you were using to know whether any other illegal transmissions were made on that day during that time?

A. During the time I was listening, I could say there were no other transmissions made on or near that frequency, either legal or illegal. It was the only signal on the air [245] capable of being heard in Seattle.

Q. Why do you say that?

A. If I had heard another signal on the air at that time, it would have interfered with my loop

(Testimony of Everett Ames.)

bearings and my S meter run. Also, I would have heard a heterodyne, which is a whistle, between the two stations. If they were within approximately five or six kilocycles of each other, I would have heard a signal between the two, a howl, a whistle, or something.

\* \* \*

Q. I direct your attention to the date of February 10, 1949, and ask you what you did on that day by way of investigation of the case?

A. On that day, I was in the mobile unit with Hallock as the driver.

Q. Would you set the times, please?

A. On February 10, I was in the mobile unit approximately 12:30 p.m., with Engineer Hallock as driver, and I was at the receiver controls.

Q. Go ahead and describe what you did.

A. We heard the signal again at the same location, same dial setting, same frequency, 3536 kilocycles. I immediately told Hallock which directions to drive to take S meter [246] readings. I did not want to risk being seen with the loop up, so we did not take loop bearings.

Q. Just describe what you did.

A. On that day we drove past the hotel twice, got very good S meter indications that the signal was from the hotel. I then tried a different procedure to try and place it more accurately. I started along Stewart heading west with the mobile unit, Hallock driving, and I recorded the S



(Testimony of Everett Ames.)

meter readings as we proceeded along Stewart, that is in front of the Orpheum Theater. We then turned north, heading along Fifth, passing the front of the hotel. I was taking S meter readings at all times.

We then turned the corner, headed east along the next street over, Virginia, and went as far as the alley. We then turned south on the alley, headed back toward Stewart. In other words, we completely went around the building, noting the S meter readings as we went. They very decisively indicated the signal to come from the north side of the building, that is, in the vicinity of the corner there at Fifth and Virginia.

The Court: Will you state the north and south streets if you recall their names?

The Witness: As I recall, it was Virginia Street on the north and Stewart Street on the south. The block is a triangle almost there, but we came down the alley, so [247] it made a rectangle out of our bearings.

Q. By your S meter readings were you able to ascertain whether the signal came from low above the ground or high above the ground?

A. I very definitely had the opinion that the signal was high above the ground.

\* \* \*

Q. During what hours of the day was that?

A. That was between 1 and 1:30.

Q. That you were taking the S meter readings?

(Testimony of Everett Ames.)

A. Yes, sir.

Mr. Pomeroy: This is February 10?

The Witness: February 10.

\* \* \*

Q. Having taken your S meter readings, what did you do after that?

A. Engineer Hallock parked the car a few blocks from the hotel and we proceeded on foot, but not together, to the hotel.

Q. Just go ahead with your story.

A. I entered the hotel and immediately went upstairs. I don't recall whether I went up in the elevator or whether I walked. I did go upstairs to the top floor.

Q. Did you have any equipment?

A. I had this small receiver which was underneath my coat, it was lashed to a web belt and I had a small loop antenna also under my coat. The only thing visible was one of those small hearing aid buttons in my ear.

Q. Were you receiving any messages at that time?

A. I did not receive messages until I—well, as I recall now, I did walk up the steps. They are bounded by a metal door into each room, probably a fire door, I suppose. [249]

The Court: Each room or each floor?

The Witness: Each floor. When I opened the door to the twelfth floor, I immediately heard the same type of signals I had heard on the receiver in the car.

(Testimony of Everett Ames.)

Q. On what band? A. 3536 kilocycles.

Q. That is the same band?

A. That is the same band.

Q. Do you recall the language of the message?

A. I heard phrases, "Testing, one, two, three, four." I believe I heard, "Testing for modulation."

Q. Any names used?

A. I did not hear any names.

Q. Just a series of testing, is that correct?

A. That is correct.

Q. What did you do after hearing that?

A. When I stepped into the hallway, I immediately heard this signal. I then walked down the hall to the elevator shaft, which was in the center of the hall, and the signal became very greatly lessened, and when I was about opposite the elevator shaft I could not hear it again. I immediately then walked back toward this stairway door and it increased a short distance beyond that. As I turned the corner, it then started in to decrease again, which very definitely indicated that the signal was strongest in front of Room 1217. [250]

\* \* \*

Q. You say your receiver indicated Room 1217?

A. Yes. That was an oral test, and I then proceeded down to the floor beneath, which was the eleventh floor. I again noted I could not hear the signal while in the stairwell. I did hear the signal on the eleventh floor, but it wasn't nearly as loud on the eleventh as it was on the twelfth.

(Testimony of Everett Ames.)

Q. Then what did you do?

A. I then walked in each direction from the corner to note whether the identical situation would be observed, and it was. I then immediately went to the elevator. I don't recall that I entered the elevator on the eleventh or the twelfth; however, I went in the elevator to the lobby and I saw Engineers Hallock and Arlowe in the lobby.

Q. What did you do?

A. I reported my findings to Engineer Arlowe.

\* \* \*

Q. Just tell what happened.

A. Some conversation about the room took place between Arlowe and myself. He had information that persons with the names we had mentioned, Casey and Plesa, had occupied that room, 1217, so we immediately went on the elevator up to the [251] twelfth floor and I then heard the signals again.

Q. What did you hear at that time?

A. There was more "Testing, one, two, three, four."

Q. Could you locate the center of transmission?

A. I again located the center as being Room 1217, and Arlowe was with me. At one time I repeated to Arlowe what I heard so he could verify what I heard by listening in the door.

Q. Was it the same?

A. It was the same. We compared words.

Q. How was Arlowe listening at that time?

A. He was listening with his ear to the door.

[Testimony of Everett Ames.)

He could hear voices, not through any medium of radio, but directly.

Q. What did you do then?

A. I recall there was a maid wandering around the hall somewhere, so I walked past it and went to the floor below, eventually ended up in the lobby again. I didn't go back up there.

Q. To make it a little more clear, who was with you at the door at that time?

A. Arlowe was with me, the engineer in charge.

Q. Anybody else?           A. Not at that time, no.

Q. You say that you left that location, the door of Room 1217, and you went where? [252]

A. I went to the floor below to again verify my results, and they were the same. I then proceeded to the lobby. I was talking to Engineer Hallock. We more or less stood down there without much to do.

Q. About what time of day was that?

A. It was probably between 1:46, I believe that was the time Engineer Arlowe heard the signal in the door, and possibly 1:50, 1:52.

Q. Why are you so positive about the time?

A. Because he told me the time at this time.

Q. He told you the time then when you were in front of the door?

A. I believe he mentioned the time, or something to that effect. I also remember I looked at my watch on the way up in the elevator.



[Testimony of Everett Ames.)

Q. What time was it when you looked at your watch?

A. Approximately 1:42, that is when Arlowe and myself were going upstairs in order to hear that.

Q. You say that you were down there in the lobby and didn't have much to do. Why was that?

A. I was waiting instructions.

Q. What were your instructions?

A. I figured that I had already located the room. We were just waiting then for a warrant to make the arrest.

Q. Did anybody go for a warrant? [253]

A. I believe Engineer in charge Arlowe did. He said he was going to.

Q. Then what did you do?

A. Engineer Hallock and myself, we stood a little behind—I don't mean behind the desk, but there was sort of a passage there where we were out of people's way, by where the telephones were. We just stood by waiting until such time as the warrant could be served.

\* \* \*

Q. Up to that time, the time you located the transmissions in Room 1217, did you see any of the three men?

A. I don't recall seeing any of the three.

Q. You testified you went back to your office?

A. Yes, sir.

Q. What occurred after that?

A. A short time later, a telephone call was received and Engineer Hallock, I observed, was talk-

[Testimony of Everett Ames.)

ing to Mr. Standard, assistant manager of the hotel. Hallock then told me that they were about to check out and that they had a car at the Motor Ramp Garage. Hallock and I then decided we had better go to the Motor Ramp Garage, because at that time we did not know whether or not the warrant had been served, and we figured at that time, in the event the persons operating this transmitter that we had traced were going to go somewhere, we could follow in our car.

Q. Did you go to the garage? A. We did.

Q. Would you state the time approximately when you arrived there?

A. As near as I can recall, it was probably about 2:15, some place thereabouts.

Q. What time did you estimate?

A. About 2:15, or some place thereabouts.

Q. Could you set the time approximately to the best of your ability when you left the lobby of the hotel to go to your office?

A. Well, as near as I can recall, it was about 1:55, maybe one or two minutes earlier.

Q. How long did you remain in the garage?

A. Well, I was there for about 10 or 15 minutes and then I left and I returned probably 10 minutes later, waited until probably 3:20 or 3:15.

Q. Before we get ahead of ourselves in the portrayal of these events, what did you do when you arrived at the garage at approximately 2:15? [255]

[Testimony of Everett Ames.)

A. We talked to the attendant there, Turner was his name, and he told us that the car was there in the garage and that some person had recently—I mean had a very short time before, told the attendant to put two bags into the car. The attendant did do that, he said.

Q. Upon receiving that information, what did you do?

A. I believe about that time we got a telephone call from the office.

Q. Did you talk on the phone?

A. No, I did not. Engineer Hallock did. I believe the telephone call was about that time, as I recall, stating that a warrant was served, or I should say, the warrant was issued or the complaint had been filed, or something to that effect, indicating that action had already been taken and accomplished in making out a warrant.

Q. Then what did you do?

A. I believe it was following that that I asked Turner to accompany me down so I could see the car.

Q. Did you see the car?           A. I did.

Q. What kind of a car was it? [256]

A. It was a Packard convertible coupe, black, 1948 model, I would judge.

Q. Do you remember the license?

A. It had a Rhode Island license, I don't recall the number now, a '48 license plate.

Q. Were you able by any other means to more definitely identify the car?

[Testimony of Everett Ames.)

A. I had never seen the car before; however, the attendant told me it was the car he put the luggage in.

Q. What did you do?

A. I asked the attendant whether he had the keys for the car, or who had custody of it. He said he had the keys for the car.

Q. Then what occurred?

A. I asked him if he could open the back compartment in the car, and I saw the two suitcases.

Q. Did you take the suitcases out at that time?

A. I didn't remove the suitcases from the car.

Q. Did you open the suitcases at that time?

A. I opened the large suitcase, looked in and saw the transmitter, and closed it.

Q. Did you take any of the things from the trunk at that time?

A. No, sir, I took nothing from the suitcase, nor did I take anything from the car. [257]

Q. Then what happened?

A. I told the attendant to lock the car again.

Q. Go ahead with your story.

A. We then waited for some time in the office of the garage. I was waiting for somebody to come and pick them up. About that time we had a telephone call from our office again advising us—this was apparently from Wiltse, the engineer in charge, so Hallock told me—advising us to contact a policeman if we could, so that we would not have trouble or a disturbance or something, we did not

[Testimony of Everett Ames.)

know the nature of the people that we had been tracing and we did not want a riot or some such disturbance to take place.

Q. Where was the car in the garage when you saw it?

A. It was on the lower ramp, one deck below street level.

Q. Did you call any police?

A. I spent about 15 minutes looking for one, didn't find one and returned to the garage. Very shortly thereafter a police car had been dispatched by our regional manager, Mr. Wiltse, and it arrived in front of the garage.

Q. Then what happened?

A. Hallock and I told the police officer that we were expecting—no, we didn't say that. We told them that we had this case in question and that we thought the persons that owned this car may try to get away before we could get the warrant served, and we told the police that we didn't [258] want them to do anything but stand by in case there was some kind of violence, or possibly they could trail the car in the event it did go from the garage?

Q. Then what happened?

A. The police car went down underneath the deck to the same ramp that the car under question was on and parked, I don't recall, maybe 25 or 30 or 40 feet away from the car.

Q. Go ahead with your story.

A. I waited around and a short time later En-



[Testimony of Everett Ames.)

gineer Wood came down and he told me that the warrant had been issued, that the arrest was being made up at the Benjamin Franklin Hotel, that he was with Arlowe and the deputy marshal and that they were trying to locate the transmitter equipment, so I then proceeded with Engineer Wood up to the hotel, to Room 1217. In Room 1217, of course, was the marshal.

Q. Could you approximately set a time as to the time that you left the garage and the time that you arrived back in Room 1217?

A. In the neighborhood of—well, I could say how long it took me to get there, I don't know exact times. I could say it was in the neighborhood of 3:20 or 3:25 when I arrived at the hotel. It probably took me about three or four minutes to go from the garage up there.

Q. Where is the garage in relation to the hotel?

A. It is directly behind the hotel, separated only by an [259] alley.

Q. After you arrived back in Room 1217, what did you see and hear?

A. On first entering the room, I saw Deputy Marshal Scully and I saw the three defendants and then I saw Arlowe. I didn't see him right at first. I believe Arlowe had just completed a telephone call, or was completing it as I entered, and he told me that Wiltse said, Regional Manager Wiltse had said that the equipment was in the car, but I also furnished him that information at that time.

[Testimony of Everett Ames.)

Q. You told Mr. Arlowe at that time that you had located the equipment in the car?

A. Yes. The arrest had already been made, incidentally.

Q. Who was in the room when you arrived other than Scully and Arlowe?

A. There was Plesa, LeClair and Casey.

Q. These three men here?

A. Those three men.

Q. Can you identify these men positively as being the men who were in that room?

A. I definitely can. [260]

\* \* \*

Q. After you left the room, where did you go?

A. Down in the elevator.

Q. All of you together?

A. Yes. I heard some conversation about—one of the three defendants, I don't recall which now, asked how they were going to be taken. Somebody objected to making it noticeable as they went through the lobby, and I believe one of them offered to pay the cab fare up to the marshal's office, something to that effect.

Q. Did you hear any other conversation?

A. No, I didn't.

Q. Did the elevator eventually arrive at the first floor?

A. Yes, it did.

Q. What occurred then?

A. Arlowe and myself, along with Engineer

[Testimony of Everett Ames.)

Wood, then went to the garage, not accompanied by anybody else.

Q. What happened to the defendants and Scully? Where were they when you last saw them?

A. I believe they were in the lobby, as I recall.

Q. You and who else went to the garage?

A. Arlowe and Engineer Wood. [262]

\* \* \*

Q. What time would you say it was?

A. Probably about 3:30.

Q. How long did it take you to get over to the garage?

A. Possibly about two minutes. We went directly.

Q. What did you see and hear after you arrived at the garage? What did you do?

A. After arriving at the garage, we immediately went downstairs and the attendants, both of them, were there. There was another fellow which I identified, having remembered his name later as Mr. Donofrio, and I saw the police car at a distance.

\* \* \*

Q. Did you talk to Mr. Donofrio?

A. Not then. I did later, I believe.

\* \* \*

Q. You say you talked to him later? When is "later"?

A. He asked if he was being held for anything. I told him as far as I knew he wasn't, and he came up to the Marshal's office with us, not at our request, but he just tagged along.

[Testimony of Everett Ames.)

Q. What was he doing there, do you know? [263]

A. No, he wasn't doing anything. In fact, I told him myself he wasn't being held for anything.

Q. After arriving back at the garage, what did you do by way of further investigation?

A. Well, I then asked Turner to open the back of the trunk. Arlowe was there at the time, and Engineer Wood was right there, and Turner opened the trunk. I then took the equipment out. There were only those two bags in the trunk both times.

Q. By the two bags, I would like to direct your attention to Plaintiff's Exhibits 5 and 6 for identification. [264]

\* \* \*

Q. I believe, Mr. Ames, I had directed your attention to the suitcase there, the large one. I will ask you if you can identify that?

A. Yes, I can identify that.

Q. Where did you see that before?

A. I saw that in the back of the Packard convertible coupe the first time.

Q. Is that the bag that you removed from the car?

A. Yes, that is the bag.

Q. Did you open the bag after you removed it from the car?

A. Yes, we did. Well, we opened it as we were taking it out, slid it forward and opened it, looked at the equipment, and then we took it to the Marshal's office.

Q. When you looked at that equipment—would

[Testimony of Everett Ames.)

you take a look at that equipment in the bag at this time? Tell us whether it is the same equipment you saw in the bag at the time you opened it.

A. Yes, that is the same equipment that I saw in the bag [265] when I opened it.

Q. What is it?

A. It is a radio transmitter.

Q. Can you describe it more fully?

A. Yes, it is a radio transmitter, it is made by Harvey Wells, Model TVS 50.

A. At the time you found that transmitter, on what frequency was it set?

A. There was a crystal in the front of the transmitter, and on that crystal was marked 3535.6 kilocycles.

Q. In your opinion, is that the same transmitter that was transmitting the signals which you heard?

A. In my opinion, it was.

Q. What did you do with that transmitter?

A. We took the transmitter to the U. S. Marshal's office.

Q. About what time of day was that?

A. We left approximately 3:35, I believe.

Q. When did you arrive at the Marshal's office?

A. About 10 or 15 minutes later. We went directly in the car.

Q. Did you see the defendants at the Marshal's office?      A. Yes, I did, all three. [266]

\* \* \*

Q. Concerning the automobile from which you



[Testimony of Everett Ames.)

took the bags, were you able to in any way more specifically identify the car as to ownership?

A. I made a note of the license number at that time. Also, Mr. Arlowe, who was with me the second time I saw the car, had the—took the registration certificate from the car and he showed me so I could observe the name of the owner.

Q. What was the name?

A. It was George LaClair.

Q. George who?                      A. George LaClair.

Q. LaClair?                      A. Yes. [267]

\* \* \*

### Cross-Examination

By Mr. Pomeroy: [275]

Q. Directing your attention to February 10, you stated, I believe, that after taking Mr. Arlowe up to the room on the twelfth floor and taking this test outside the door of Room 1217, you and Hallock then remained in the lobby for a short period of time after Mr. Arlowe had left to go to the United States Court House, is that right?

A. I don't know whether it was after or not. I left Arlowe there. I went down to the lobby and met Hallock and we stayed around there for a short time. I don't know what happened to Arlowe at that time.

Q. Where did you last see Arlowe?

A. Upstairs on the twelfth floor.

Q. You mean you left there alone when this maid showed up and Arlowe stayed right there?

[Testimony of Everett Ames.)

A. I don't know where Arlowe stayed, but I went down to the eleventh floor and checked the reception down there, and I later went to the lobby, and I didn't see Arlowe again.

Q. How did you know Arlowe went for a war-rant?

A. He told me he was going to after hearing the evidence that he testified to.

Q. And that was about 1:46?

A. About that time, I believe.

Q. And then you went down and you stayed for a short time [289] with Hallock in this little areaway which goes to the telephone booths in the Benjamin Franklin Hotel, is that right?

A. That is correct.

Q. Then you left there and went to the FCC office on First and Marion?

A. Yes. We first walked around looking for a telephone and finally decided to go back to the office.

Q. After you returned there you received a call from Mr. Standard, as I understand it. Did you receive that call, or Mr. Hallock?

A. I heard Mr. Hallock talking to Mr. Standard.

Q. And he said that someone was checking out and removing some bags out of this room, is that right?

A. That is what he told me, that the bags were being taken away.

Q. Then Mr. Hallock went directly back up to the Motor Ramp Garage, is that right?

[Testimony of Everett Ames.)

A. Yes, we both went together.

Q. And you arrived there about 2:15?

A. Approximately that time.

Q. Did you before you left the FCC office telephone the Motor Ramp Garage? A. I didn't.

Q. Did anyone that you know of?

A. I don't know. [290]

Q. Tell us whether or not Mr. Hallock or you did not call the Motor Ramp Garage?

A. I did not. I don't know who else may or may not have called.

Q. Do you or do you not know whether Mr. Hallock called the Motor Ramp Garage before you left your office to go up there?

A. I do not know whether he did or not.

Q. You have no knowledge?

A. I have no knowledge.

Q. When you arrived at the Motor Ramp Garage at 2:15, you immediately went with the attendant down into the place where they keep cars in that garage, is that right?

A. I don't recall whether it was immediately, I think it was a very short time later.

Q. What were you doing after you arrived and before you went down, if you didn't go right away?

A. Well, we were talking in that little office there.

Q. Talking to whom?

A. The Motor Ramp Garage, I guess you would call him, attendant Turner.

Q. Mr. Hallock and you and Mr. Turner, is that right? A. Yes.

[Testimony of Everett Ames.)

Q. Was there anyone else present?

A. I believe the other attendant was, I didn't notice particularly whether he was there. He wasn't there all the [291] time, but he may have been in or out.

Q. Tell us what that conversation was that delayed you in getting down to the garage.

A. I can only recall hearing Hallock mentioning something about the case, the fact that this car was being used by people that we were obtaining a warrant for their arrest.

Q. That was told by Hallock to the attendants?

A. I believe it was Hallock that said that.

Q. What other conversation if any do you recall?

A. I don't recall any other conversation.

Q. Immediately after that, you went down to the place where the car was stored?

A. There was a telephone call which I cannot place whether it was before or after I went down.

Q. Who made the telephone call?

A. The telephone call was to our office. Hallock made it.

Q. Hallock made a call to your office?

A. As I recall, yes.

Q. Then you went down to the car, is that right?

A. That is right. [292]

\* \* \*

Q. After 2:15 or 2:20, you then returned, after looking at Plaintiff's Exhibits 5 and 6, as you claim,

[Testimony of Everett Ames.)

in the car, you went back to the office of the Motor Ramp Garage, is that correct?

A. That is correct.

Q. Then you stayed there? A. Yes.

Q. You stayed there until after the arrest of these defendants? A. No.

Q. When did you leave there?

A. I stayed there for a short time, and then I went out to find a policeman.

Q. You went out to find a policeman?

A. Yes, sir. [293]

Q. You knew Mr. Arlowe was down obtaining a warrant of arrest for these men, didn't you?

A. Yes, sir.

Q. And you went and looked for a policeman?

A. Yes.

Q. How long have you been with the FCC?

A. Since 1940.

Q. Did you find a policeman?

A. I did not.

Q. Then what did you do?

A. I went back to the office of the garage.

Q. What was the purpose of your looking for a policeman?

A. I didn't know the nature of the men. We didn't want a riot started.

Q. You mean you were afraid of your personal safety?

A. Yes, also of the safety of the garage, I suppose.

Q. What's that?



[Testimony of Everett Ames.)

A. Also the safety of the garage, we didn't want any disturbance.

Q. You were looking out for the safety of the Motor Ramp Garage?

A. I suppose we just figured it would be a good idea to have policeman in case they started a riot.

Q. You didn't find a policeman and you returned? A. That's right. [294]

Q. Then what did you do?

A. A short time after that a police car did drive up. I went over to the car——

Q. Over to the police car?

A. Over to the police car.

\* \* \*

Q. Then you walked over to the police car? Where did the police prowl car go after it came into the garage?

A. I went on the lower deck and parked a short distance away from the car in question.

Q. How many policemen in it? A. Two.

Q. Seattle City policemen?

A. Seattle City policemen.

Q. What did you tell them?

A. Joe and I told them——

Q. Who is Joe?

A. Hallock. He and I told them of the case, that we [295] expected to make the arrest shortly, and in the event the warrant had not been served and the men did come down for the car, that we were afraid there might be a riot. I don't know if we used those words or not, but we told them that we were going

[Testimony of Everett Ames.)

to arrest them, or follow them. I should say follow them, not arrest them, because we had no way of arresting them.

Q. You were going to follow them, is that right?

A. Yes, and that we didn't want a disturbance there.

Q. Where did the policemen then go?

A. They stayed in the garage, I believe in their car. They were in the car the last I saw them.

Q. Where did you go?

A. I went up to hotel room 1217.

Q. After you talked to the policemen, you then went up to the hotel room?           A. Yes.

\* \* \*

Q. Did you at any time from the time 2:15 or 2:20 when you arrived at the garage, request of your office or of anyone a search warrant? [296]

A. No.

Q. Did you make any effort whatever to obtain a search warrant?

A. Engineer in charge Arlowe——

Q. Just a moment. Did you?

A. No, I didn't.

Q. You didn't attempt at any time to obtain a search warrant?           A. No. [297]

\* \* \*

[Testimony of Everett Ames.)

Redirect Examination

By Mr. Dore:

Q. You say this crystal in this transmitter was 3536, is that correct? A. 3536, yes.

Q. Does that set the band of frequency?

A. It sets a center frequency of the transmitter. The transmitter occupies a small spread of frequencies. They are called side bands, but the center frequency is determined by the crystal.

Q. You say that on each side of that 3536 there are other bands, as you call them?

A. There are side bands, when voice is spoken into the microphone and the transmitter is modulated voice.

Q. Could you explain to me the reception of energy transmission sent out on 3536 from this transmitter? [300]

A. If you were to explore the band, you would find right at that frequency, 3536, there would be what they call the tower frequency. It is a point frequency, I mean it isn't wide, it is a spot frequency, and then from that out in either direction there is radio energy in what they call the side bands.

Q. In other words, if I had a radio and I set the receiver dial on 3537, say, could I hear a broadcast by a transmitter that was set on 3536?

A. Yes, you could. You would hear it somewhat distorted, but still interchangeable, very interchangeable, I would say.

[Testimony of Everett Ames.)

Q. How many side bands to the side would you say that goes in each direction?

A. Normally, for this type of a transmitter, that would go out for about 4 to 5 thousand cycles on either side, which is 5 kilocycles.

Q. In other words, for a transmitter that had a crystal set at 3536, do you mean by your explanation that I could hear and receive with reception set on my band up to 3541 on one side?

A. You would still hear parts of the signal, provided it was voice modulated with full voice frequencies. However, it would be attenuated, it would get weaker as it got out.

Q. Would the bands on which I could receive extend over to the left to approximately 3532? [301]

A. That depends on the type of receiver. Some receivers are broad, they would cover a wide part of the spectrum. Others are more short. That is determined by the receiver itself.

Q. That would be the same as on my radio at home?

A. Yes.

Q. Receiving on a certain frequency?

A. Yes. You may have noticed if you tune from one side to the other of a station you can still hear that station as you tune away from the center frequency.

Mr. Dore: No further questions.

Mr. Pomeroy: No questions.

The Court: Step down.

(Witness excused.)

## TILLIE JAMES

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows;

## Direct Examination

By Mr. Evans: [302]

Q. Where are you employed?

A. Stratford Hotel.

Q. Where is the Stratford Hotel?

A. Third and Seneca.

Q. Is that in the City of Seattle? A. Yes.

Q. How long have you worked there?

A. A little over a year. Then I took three months off, went and made a trip to Sweden, just came back.

Q. Were you working there during the months of January and February of this year?

A. Yes, I was.

Q. What are your duties in your employment in the Stratford Hotel? A. Hotel maid.

Q. What floors or what rooms generally were you required to take care of during January and February, 1949?

A. All the fifth floor on the Stratford Hotel.

Q. I will ask you whether or not at any time during the first week in February you ever saw any of these defendants in the hotel?

A. I see all them three. Two came and registered but also [303] a third one was with them a lot of the time.



(Testimony of Tillie James.)

Q. Do you recall what day they arrived at the hotel?      A. Wednesday morning February 2.

Q. At the time that they arrived, do you recall what room they went to?      A. 507.

Q. At the time they arrived, was that room made up ready for their occupancy?

A. No, that wasn't made up.

Q. I will ask you whether or not you made that room up?      A. Yes, I did.

Q. Just what occurred at the time you were making that room up?

A. They came and asked me to make this room, and they came and stayed there all the time I was making this room, and told me not to do it so much, "Everything is all right, just make the beds and give us the towels."

Q. Is that normal procedure when you are making up a room?

A. No, that isn't normal proceeding. I never need to go in a room where guests are in the room, especially when a room isn't made before the new guest comes in.

Q. Were all three of these gentlemen here present when they first came in?

A. No, there was only two.

Q. Which two? [304]

A. Them two on the back.

Q. That is the two sitting in the back row?

A. Yes.

Mr. Evans: May the record show that Mr. Casey and Mr. Plesa are seated in the back row as they

(Testimony of Tillie James.)

are now located here in the room. Is that agreeable, counsel?

Mr. Pomeroy: Yes.

The Court: The record may so show.

Q. Thereafter, do you recall how long these defendants occupied that room?

A. They occupied from February 2 till February 5, in the morning or during the night. When I came February 5, the room was vacant, but the beds wasn't used since I made them February 4.

Q. At any time thereafter after you first made the room up did you make the room up again?

A. I made it every day.

Q. Were you ever able to enter the room when there was no one there?

A. No, I never was, when they wasn't in there.

Q. Will you state whether or not there were any directions given you when you would go in to make up the room, on the 3rd or 4th?

A. They always asked me first thing, before I even started to work, before I even changed my clothes, they asked me to [305] make their room, and always the same thing, "Don't be so fussy, the other bed isn't used." There was two beds, but one bed never was used. There were two men registered in the room. They said, "The other bed isn't used, just make up the bed, give us the towels, you don't have to be so fussy," but they never leave the room while I was there.

Q. On any occasion did you notice any of their baggage?

(Testimony of Tillie James.)

A. Well, they had two bags, one was a zipper bag, reddish-brown, and the other one was sort of a light tan or whatever you may call it.

Q. Will you state whether what has been marked for identification as Exhibit 5—

A. There was a bag like that in the room.

Q. That is referring to what has been marked for identification as Exhibit 5?

A. Yes. Well, there was a bag, of course, I never went any closer. I seen this standing on the floor.

Q. There was a bag that resembled that which is now before you?      A. Yes. [306]

\* \* \*

Q. Did they ever make any indication that they were in a hurry for you to get out of the room?

A. Yes, they gave me that all the time.

Q. Will you state whether or not on any occasion you saw any wires in the room?

A. I seen one morning a wire laying on the window sill, but I wasn't close enough to know whether that went out or whether it was just laying on the window sill.

Q. Can you tell us as nearly as you can generally what the wire looked like? Did it look like a piece of bailing wire, light wire?

A. It looked like a piece of radio wire, very narrow radio wire.

Q. Could you tell whether or not it was covered wire or bare wire?

A. I couldn't tell that, because I was being a

(Testimony of Tillie James.)

little bit nervous at being in the room when the mens are in the room. I am not used to that.

Q. At any time did you hear any conversations in this room?

A. Yes. When I was in the other room, making the other room one time, I recall the fellow saying, "Oh, you're nervous," and the answer was, "I'm not nervous, look at my shoulders."

The Court: I don't understand.

The Witness: "Look at my shoulders," and shortly after [307] I heard the voice again say, "Reckon anybody knows anything about us?" Also, the voice say, "Reckon we better pull out of here."

Q. Was that a question or a statement as you heard it?

A. Well, that was in the same statement, it was the conversation I heard when I was in the other room.

Q. Do you recall about what day it was you heard that?

A. I am not sure whether it was the 3rd or 4th, I am not sure what. I think it was on the 4th.

Q. Will you state whether or not you ever heard any conversation with regard to a battery?

A. Yes. When they came in that first morning, there was talking between them, "We got to get a battery."

Q. Who all was present then?

A. The two fellows registered in, and me, I was making the room.

(Testimony of Tillie James.)

Q. What two fellows do you speak of? Are they here in the courtroom?

A. Yes. I don't recall anybody's name, I haven't got no way to know anybody's name, but like I stated, the two fellows registered in.

Q. Can you point out the two fellows?

A. Them two in the back, the littlest one and the stout fellow.

Q. That is Mr. Casey and Mr. Plesa in the back row here? [308] May the record so show, they are the two defendants sitting in the back row?

Mr. Pomeroy: Yes.

The Court: Let the record show that.

Q. On any occasion did you hear any unusual sounds coming from this room?

A. Yes. I also heard, when I was making this room 506, I heard them, "Testing, one, two, three, four, testing, one, two, three, four," repeatedly, for all the length of time I was in this room.

Q. About how long did that go on?

A. 20 minutes maybe 25 minutes. [309]



## ANN ALHADEFF

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Evans:

\* \* \*

Q. Are you employed? A. Yes.

Q. Where?

A. At the Benjamin Franklin Hotel, elevator operator. [321]

\* \* \*

Q. Do you recall whether you were working there on February 9 and 10, 1949? A. Yes.

Q. Will you state whether or not you have ever seen these three defendants here, Mr. Casey, Mr. La-Clair and Mr. Plesa, around the Benjamin Franklin Hotel? A. Yes, I have.

Q. Do you recall about when they were there?

A. I would say about the 3rd to the 5th, or something like that, I can't recall.

Q. What month? A. February.

\* \* \*

Q. Do you recall at any time having taken one of them from the twelfth floor down to the lobby with any baggage?

A. Yes, sir, but I don't recall which one.

Q. Prior to that, had you seen any of them on the mezzanine floor? A. Yes, two.

Q. Do you recall which two? [322]

(Testimony of Ann Alhadeff.)

A. Yes, Casey and the one in front sitting next to Mr. Pomeroy.

Q. That is Mr. LaClair sitting beside Mr. Pomeroy.      A. Yes.

Q. I will ask you whether either one of those went to the twelfth floor in your elevator?

A. Yes, the one did, I don't recall which one.

Q. How long thereafter before that one came back down?

A. I would say from three to four minutes.

Q. At the time he came back down, did he have any baggage with him?

A. Yes, he had two bags.

\* \* \*

Q. Do you recall ever hearing anything about these defendants being arrested?

A. Not till the next day, I saw it in the paper.

Q. You saw it in the paper the next day? [323]

A. Yes, but I don't remember the date.

Q. With relation to the day you saw it in the paper, when was it you took one of these two gentlemen up in your elevator to the twelfth floor?

A. There was one that rang from the mezzanine and wanted to go up to the twelfth floor.

Q. What day was that with respect to the day you read in the paper about their being arrested?

A. I think it was the day before.

Q. Did you take that same person back down again at any time thereafter?

A. When he rang for the elevator, I went up to

(Testimony of Ann Alhadeff.)

the twelfth floor and got him. He rang to come down and he had two bags with him.

Q. Will you describe what the two bags looked like.

A. A large suitcase, blackish-gray, and the other was small, wine, I thing. I think they are in this room.

Q. Will you bring out what has been marked for identification as Plaintiff's Exhibits 5 and 6 and let the witness look at them?

A. Yes, that was one.

Q. Showing you what has been marked for identification as Exhibit 5, will you state whether or not that appears to be——

A. Yes, both of those.

Q. 5 and 6? [324]

A. Yes.

The Court: The record does not show which one, when you were referring to which one.

Q. Showing you Plaintiff's Exhibit 5 for identification, will you state whether or not that appears to be one of the bags which this gentleman had with him when he came down?

A. Yes, that was one.

Q. Showing you what has been marked for identification as Plaintiff's Exhibit 6, will you state whether or not that appears to be the other bag which this gentleman had with him when he came down from the twelfth floor?

A. Yes.

Q. What was your answer?

A. Well, both of those, Exhibit 5 and 6.

The Court: He was asking you last about Plaintiff's Exhibit 6. Be specific and have the witness'

(Testimony of Ann Alhadeff.)

attention made specific in response to your questions.

Q. Will you wait for your answer until I have asked the whole question? Calling your attention to Plaintiff's Exhibit 6 for identification, which is the article now in the hands of the bailiff, will you state whether or not that appears to be the same bag which the gentleman had, which you have spoken of before, when he went from the twelfth floor down to the lobby?

A. Yes, sir. [325]

\* \* \*

Q. Do you recall about what time of day this was?

A. Yes, it was between 2:15, I think about 2:15 or 2:20, something like that.

Q. Do you recall what date that was?

A. No, I don't recall.

Q. But you do recall it was the day before the day you read in the paper they had been arrested?

A. That's right. [326]

\* \* \*

### KARL STUBER

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows;

#### Direct Examination

By Mr. Evans:

Q. State your full name and spell all of your name for the reporter, please?

A. K-a-r-l E. S-t-u-b-e-r.

(Testimony of Karl Stuber.)

Q. What business are you in?

A. I am a tailor.

Q. During the months of January and February, 1949, where was your place of business?

A. In the Benjamin Franklin hotel building on the ground floor.

Q. Calling your attention to the date of February 7, 1949, do you recall whether or not you had occasion to visit Room 1217.

A. I was upstairs, yes. [327]

Q. I will ask you whether or not you entered that room?

A. I did.

Q. Who was present?

A. The three gentlemen there.

Q. That is the three defendants here, Mr. Casey, Mr. LaClair and Mr. Plesa?

A. That's right.

Q. What was the occasion of your visit there at that time?

A. I was called upstairs to get the cleaning. They had some cleaning to be done and some alteration of some garments which they bought someplace else in town a day or two before. I was up there for the purpose of doing alteration and fitting, which I did.

Q. At that time, will you state whether or not there was any discussion about samples, for your making a suit for them?

A. Yes, they were asking me if I made suits. I says, "I do," and one of the gentlemen told me if I had a sample case. I says, "I have," and he told me to bring the samples up.



(Testimony of Karl Stuber.)

Q. Do you know whether or not all three of these gentlemen were living in that room at that time?

A. I don't know if they were living there, but they were there when I was up there.

Q. While you were there, will you state whether or not any food was brought to that room? [328]

A. Yes, they had breakfast.

Q. Do you recall whether or not it was breakfast for just one or two or all of them?

A. I think it was for three.

Q. Later on, on February 7, did you again at any time go to Room 1217? A. Yes.

Q. What if anything did you take with you?

A. My sample case.

Q. Do you recall about what time of day that was? A. That was around 2 o'clock.

Q. I will ask you whether or not you left the sample case there? A. I did. [329]

\* \* \*

Q. I will ask you whether or not on any other occasion you ever returned to that room?

A. I did.

Q. What day was that?

A. It was—I am not sure if it was Wednesday or Thursday. Anyway, it was the day before the gentlemen were arrested by the Federal Communications. I think it was on Thursday, if I am not mistaken. It was the same afternoon, because I read the following morning that they were picked up the

(Testimony of Karl Stuber.)

same evening. If I am not mistaken, it was on Thursday.

Q. Do you recall what day of the month it was that you read in the paper they had been arrested?

A. It was February, I think it was on a Thursday.

Q. Do you recall the date?

A. Was it the 10th, or—I am not sure on that now.

Q. Your best recollection is what date?

A. It was the day before I read it in the papers. I read it the following morning, their picture was on the front page of the P. I.

Q. What I mean is, do you have any recollection, and if so, what is your best recollection as to the date?

A. I think it was Thursday. The date, I don't know. [330]

\* \* \*

## ROBERT DIETSCH

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Dore:

Q. Where do you work?

A. I am an engineer for the Federal Communications Commission. [331]

\* \* \*

(Testimony of Robert Dietsch.)

Q. Were you employed by the FCC on or about February, 1949?      A. I was.

\* \* \*

Q. On or about that time, were you assigned to the investigation of this case?      A. I was.

Q. Who assigned you to this case?

A. Engineer in charge, Mr. Arlowe.

Q. To what duties were you assigned? What orders did you receive?

A. On February 5, at his direction, I was instructed to take monitoring equipment in the form of a portable receiver and go aboard a United States Coast Guard cutter.

Q. Do you recall the number or name of that cutter?

A. No, I do not. It was a Coast Guard cutter that was based at the bottom of the Spokane Street bridge. As I was saying, I was instructed to go aboard this Coast Guard cutter [332] and proceed out into the navigable waters of Puget Sound, out into Elliott Bay.

Q. Did you do that?      A. That I did.

Q. At what time of the day or night?

A. It was on Saturday, February 5, approximately 12:30 that we left the dock, 12:30 noontime, p.m.

Q. Having come aboard ship, where did you proceed?

A. The vessel proceeded down the waterway, the east waterway and then out into Elliott Bay approx-

(Testimony of Robert Dietsch.)

imately two miles north of Duwamish Head, which would put us abreast of Pier 91, or slightly a little further north towards the Government locks. We were out in the regular ship channel.

Q. Did the vessel lie to or anchor?

A. No, the vessel proceeded in circles in that general area.

Q. What equipment did you have with you at that time?

A. I had what is known as a Hallicrafter S 29 receiver, a portable receiver with self-contained battery supply.

\* \* \*

Q. Having proceeded to the place you have designated, [333] approximately two miles north of Duwamish Head, what did you do upon arriving in that vicinity?

A. Prior to leaving our office, I had calibrated the receiver for the frequency upon which we had been receiving these unidentified radio signals, so on arriving at approximately the distance I had in mind, I turned the receiver on and listened for these unidentified signals.

Q. What was your calibration on your receiver?

A. It had been calibrated for 35.36 kilocycles.

Q. Will you tell us what you did, what you heard and what you saw?

A. I listened and at first I heard nothing. Then at approximately 1:45 p.m., I heard, "Testing, one, two, three, four."

(Testimony of Robert Dietsch.)

Mr. Royce: If the Court please, this witness—is it understood that our objection to any testimony as to the broadcast claimed to have been made by these defendants is saved? I understand we have a continuing objection.

The Court: Is there any objection to it applying to this witness' testimony?

Mr. Dore: I am not certain, Your Honor, whether the objection is in point at this time. I don't believe it is in point at this moment.

The Court: Until it becomes clearer, will you state your objections as they may occur? [334]

Mr. Royce: I will restate the objection. In the first place, if this witness is going to testify as to a broadcast that does not claim to be broadcast by these defendants, the objection is that the evidence is not material. If this witness is going to testify as to a broadcast claimed to be made by these defendants, then we object to the testimony on the ground it is barred under Section 605, Title 47, USCA, and we objected all along to testimony of this nature. Your Honor has overruled the objection, but we would like to have a continuing objection. We want to be sure we have it to preserve the record, also, our motion to strike all testimony of this nature.

\* \* \*

Q. I believe my last question was to what calibration had you set your receiving equipment?

A. To 3536 kilocycles, approximately.



(Testimony of Robert Dietsch.)

Q. Is that the band upon which you had heard the previous unlawful signals you had heard? [335]

A. This was the frequency upon which we had been hearing it at our monitoring room in the office.

\* \* \*

Q. What time?

A. These signals, the first group was heard from approximately 1:43 to 1:46. Then there was a period of silence in there of approximately 25 minutes, and then the signals were again heard from approximately 2:12 to 2:16.

Q. Do you remember the band upon which you received those signals at 1:43 to 1:46?

A. 3536 kilocycles.

Q. Between 2:12 and 2:16 was it—

A. Yes.

Q. What band?

A. That again was the same band, 3536 kilocycles. [336]

Q. Do you remember whether this was a one-way or two-way signal?

A. It was one-way transmission.

Q. Do you remember the language of any of the messages?      A. Yes, I do.

Q. Would you give us the times and the language that you heard?

A. The time, the first message at approximately 1:45, went somewhat as follows, "Testing, testing, one, two, three, four, do you hear me, they are

(Testimony of Robert Dietsch.)

running at Santa Anita, they are running, they are running.” “They are running” went on for approximately 16 times, and at the end of that it said, “66, War Again, 66, War Again.” The second message, approximately 20 minutes later, was substantially the same nature, “They are running at Santa Anita, they are running, they are running,” but this time the name of the horse was Annapolis Air. [337]

\* \* \*

Q. Was anybody present with you when you heard this?

A. Yes, on the first transmission as soon as I heard it, I had earphones on, and I divided the earphones in half and gave one-half to Byron Hess.

Q. Who was he?

A. He was the enlisted personnel of the United States Coast Guard cutter.

Q. Is he in the courtroom today?

A. Yes, he is.

Q. Approximately what time did you give him that other earphone?

A. That was approximately halfway through the broadcast, when they were saying, “They are running, they are running.” I handed him the earphone.

Q. You say that is all you heard and then you returned to the base, is that correct?

A. That is correct, made two observations. [338]

\* \* \*

(Testimony of Robert Dietsch.)

### Cross-Examination

By Mr. Pomeroy:

Q. Mr. Dietsch, while you were aboard this Coast Guard cutter, did any of the equipment of that organization — was any of that used in attempting to intercept this broadcast?

A. No, sir.

Q. Yours was the only piece of equipment?

A. That is correct.

Q. There is another receiving device aboard the Coast Guard cutter than the portable unit which you took aboard?      A. Yes, sir.

Q. But that wasn't used at any time throughout your attempt to hear any broadcast?      A. No.

\* \* \*

### BYRON HESS

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Dore: [340]

\* \* \*

Q. What is your occupation?

A. I am in the Coast Guard.

Q. What is your rate or rank in the Coast Guard?      A. Seaman first class.

Q. How long have you been in the Coast Guard?

(Testimony of Byron Hess.)

A. Over two years.

Q. What are your present duties in the Coast Guard, and to what ship are you assigned?

A. I am assigned to the Coast Guard 64314. My duties are as seaman aboard.

Q. How many officers are aboard that ship?

A. There are no officers.

Q. How many enlisted men?

A. Well, about three.

Q. Were you stationed aboard that same ship on February 5, 1949?      A. I was.

Q. Do you remember Mr. Dietsch, who just testified this morning, aboard the ship?      A. Yes.

Q. Do you remember about what time he came aboard?      A. About 12:30.

Q. What occurred after he came aboard? [341]

A. He brought his radio gear aboard and we shoved off immediately under his orders as to where he wanted to go, and we laid off of Duwanish Head.

Q. About how far off Duwanish Head, would you say?

A. About two miles north, a little northwest, perhaps.

Q. Then what occurred?

A. He started tuning in his gear, sat there and listened to it for quite a while, finally got transmission and called me out, and Butler. We both went out and listened.

Q. How did you listen?

(Testimony of Byron Hess.)

A. He had earphones there.

Q. Did you have one earphone and he have the other?      A. Yes.

Q. What did you hear at that time?

A. "They are running at Santa Anita, testing, one, two, three, four," and stuff like that, the same thing. [342]

\* \* \*

### EDWARD SCULLY

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Dore: [343]

Q. What is your business or occupation?

A. I am a deputy United States Marshal for the Western District of Washington.

Q. Were you so employed on or about February 10, 1949?      A. I was.

Q. Did you on that day see these three men?

A. I did.

Q. Where did you see them?

A. In Room 1217 in the Benjamin Franklin Hotel.

Q. At about what time of the day or night?

A. Shortly after 3 o'clock in the afternoon.

Q. Under what circumstances did you see them?

A. I had a warrant for the arrest of those three gentlemen.



(Testimony of Edward Scully.)

The Court: What date was that?

The Witness: February 10, Your Honor.

Q. At about what time did you receive that warrant?

A. Well, I was out and I came in the office, it was just about 3 o'clock or a few minutes after, and Mr. Miller handed me three warrants and these gentlemen's names were on it. They told me where they were.

Q. What did you do upon receipt of that warrant? [344]

A. Mr. Arlowe was in the office at the time and he said, "I have a car, I will take you up there," so I went up with Mr. Arlowe.

Q. About how much time did it take to get over to the Benjamin Franklin Hotel?

A. That is at Fifth and Virginia, that isn't many blocks. I wouldn't say over five minutes or so.

Q. Upon arriving at the Benjamin Franklin Hotel, what did you do?

A. Well, I was informed that these people were in the lobby, and the lobby was quite full of people. I spoke to Arlowe and I said, "What room are they in," and he said 1217. I took the elevator and went up to 1217.

Q. Upon arriving at the door of 1217, what did you do?

A. I rapped at the door and a voice inside said, "Who is it," and I said, "A deputy United States

(Testimony of Edward Scully.)

Marshal," and I think Mr. Casey was the gentleman that opened the door. He opened it right away.

Q. By Mr. Casey, who do you mean? Could you point him out, please?

A. I think the gentleman alongside of Mr. Pomeroy. I am quite sure it was he who opened the door.

Q. Would you stand up, Mr. Casey? Is that the gentleman? A. I am quite sure it was.

Q. Then what happened? [345]

A. Well, I identified myself, told them that I was a deputy United States Marshal and that I had warrants for these three people. Casey said, "I'm Casey," and I read the warrant to him and he took it. Mr. Plesa was next and he was surprised and said, "Well, what is all this about," and I said, "You are now a Federal prisoner." Then I looked around for LaClair and very shortly he stepped up and says, "I am LaClair." He says, "Well, what is the procedure." I said, "You are now a Federal prisoner." [346]

\* \* \*

Q. What time did you say you went into the room?

A. Right close to 3:00 o'clock. I had been out on another detail. I came in about 3 o'clock and Mr. Miller gave me the warrants immediately and said to hurry up, there was a policeman holding

(Testimony of Edward Scully.)

somebody or something, so I went right up there with Mr. Arlowe. [347]

\* \* \*

### Cross-Examination

By Mr. Pomeroy:

Q. If his testimony is to the effect that you arrived at the Benjamin Franklin Hotel about 3:20, would you say that would be about correct? [349]

\* \* \*

A. Well, five minutes one way or the other, it could have been 3:15, it couldn't have been 3:30, but along close there. [350]

\* \* \*

### JOSEPH HALLOCK

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Dore:

\* \* \*

Q. What is your business or occupation?

A. I am a radio engineer with the Federal Communications Commission.

Q. What has been your education or experience in that field?

A. Well, I have been in radio as a livelihood since I left college in '13, and somewhat before that

(Testimony of Joseph Hallock.)

Q. Were you with Mr. Ames on the 3rd and 4th?      A. I was.

Q. Were you with him on the 5th?

A. I was.

Q. Were you with him on the 6th?

A. I was.

Q. And the 7th?      A. Yes.

Q. How about the 9th and 10th?

A. All of those days.

Q. Did you hear any unlawful messages or signals broadcast during that time?

A. Yes, continuously each day. That is to say, the 3rd, 4th, 5th, no signals on the 6th, which was Sunday, and the 7th, particularly a lot on the 7th. Then the 8th, there was no races, no signals on the 8th, and then the 9th, and then just very slightly before we made the arrest on the 10th, one race on the 10th.

Q. Were these one-way or two-way signals?

A. They were all one-way.

Q. Were they a man's voice or a female voice?

A. All men's voices.

Q. Was there anything peculiar or distinct about pronunciation or the language used?

A. One of the men used the phrase "homodulation" a great deal for modulation, seemed to give the impression there was an h in front of the word modulation. We all commented on that. It sounded more like homodulation.

(Testimony of Joseph Hallock.)

Q. Do you know upon what band these transmissions were received?

A. The first day was approximately 3936 kilocycles, but all the rest thereafter were 3536 kilocycles. That is the actual spot frequency itself.

Q. In the interest of saving time, I will ask you if these transmissions which you heard over this period of days, were they similar?

A. Very, very much so.

Q. What similarity was there?

A. Well, the normal procedure, as has been told many times, they used "Testing for modulation, one, two, three, four," many, many times. I don't recall them ever saying "one, two, three, four, five," or "one, two, three," but it was "one, two, three, four," over and over again, and the typical phraseology would be, "We are waiting for Santa Anita, we are waiting for Santa Anita," many times. Then, "They are ready at Santa Anita," many times, and "They are running at Santa Anita," many times, and that went on for quite a while. Once in a while they would use the phrase, "The stretch, the stretch," but not particularly often. And then, "It's No. 9, Blue Boy, No. 9, Blue Boy," or whatever the winner was.

Q. Was there any identification of originator or the addressee of any of these messages?

A. No, not from the message standpoint. On the 7th, particularly when they did a great deal of testing in the afternoon, appeared to be using that



(Testimony of Joseph Hallock.)

afternoon for tests, they used the names many times of Casey and Ralph, and Joe a couple of times.

Q. That was on the 7th?

A. Yes, and various other days we heard Ralph and Casey.

Q. Do you remember the time on the 7th?

A. Well, the normal procedure, generally opened up, post time seemed to be right around 1 o'clock sometime, and they generally started about 1 and ran through till 3, depending on how many races there were playing, generally four or five.

Q. Was that true of the pattern on other days, too?

A. Monday they were doing a great deal of testing with these boys around town. They weren't in the actual mechanics of the race then. They had these boys walking around. [356]

\* \* \*

Q. Did you at any time prior to the 10th see any of the three defendants?

A. Not to my knowledge.

\* \* \*

Q. Did you hear any signals during the night of the 7th?

A. Yes, the one night that I did. I was home, and we had been doing this consistently since the 3rd, and they had been jumping from one hotel to another, so I thought maybe they were using the night time for a set up at a new hotel, so I

(Testimony of Joseph Hallock.)

decided to turn on my own home receiver, which is a [357] three band receiver.

Q. Did you do that? A. I did.

Q. On what band frequency?

A. I set it on 3536, as near as I could guess from my dial, which is reasonably close, although not absolutely accurate, hoping it might pick them up if they came on.

Q. Did you intercept any signal?

A. I did, very shortly after I turned it on.

Q. Was that a voice or code signal?

A. Voice signal, with the same characteristics as we heard in the afternoon.

Q. What was the language of the message that night, if you recall?

A. It started out with the normal, regular procedure, "Testing for modulation, one, two, three, four," a great many times. And I recall them saying, "Call before you come in, I want to do something about the tailor," and then he said, "Call if you can, Joe," and he said, "How is it, Ralph." One time he said, "Is everybody happy," and another time he said, "Take a cab and go to Rendezvous B," and then one time he said, "This is CB 5," I believe that is the phrase he used. I think the final thing we heard was just "Hang on," I believe he said "Hang on," several times.

Q. Would you say that was a similar voice as you had [358] heard before? A. Yes.

Q. Could you set the time of that broadcast?

(Testimony of Joseph Hallock.)

A. My notes show approximately 7:21 to 7:45, along in there. That isn't extreme accuracy, that is the notes I had made.

Q. How did you ascertain that time?

A. Just a little clock at home, which I think was reasonably accurate.

Q. During what period of time did that message go on that you received?

A. Well, as I say, it spread from 7:20 to 7:45, but a great deal of it, as has been told you before, is a lot of time testing for modulation, and perhaps there will be considerable breaks, so that it isn't solid talking all that time.

Q. I will ask you if you were involved in the investigation on February 10, 1949?

A. Yes, I was.

Q. With whom were you operating on that day?

A. I was with Mr. Ames, as usual, in the car, after we were certain two days before that it was the Benjamin Franklin Hotel, so we were circling right around it at post time when they came on.

Q. What time was that?

A. Approximately 1 o'clock, a few minutes after. I [359] think it always was about that time.

Q. About 1 o'clock?           A. Yes.

Q. You circled around, you say. Then what did you do?

A. We were circling the hotel, waiting for them to come on, because we were positive it was the hotel and they wanted to do a little pin pointing,

(Testimony of Joseph Hallock.)

so as soon as they came on, I recall we made about one or two circles with our S meter, a little instrument that indicates the volume on a needle; instead of just hearing it, it indicates it.

We circled it and then I went to park the car and Mr. Ames went on into the hotel to look through the various floors. I think I am right, I don't believe he walked around any more. I believe he went directly into the hotel.

Mr. Pomeroy: I think he should testify to what he knows and what he did, not to what Mr. Ames did.

The Court: The objection is sustained. Be certain, Mr. Hallock, to state only what you observed.

A. Mr. Ames either then or very shortly thereafter went into the hotel to explore on the various floors.

Q. What did you do?

A. I went into the lobby, the lower part, and I was keeping contact, phoning the office to see if there was any new developments down there, sort of contact man below.

Q. What occurred? [360]

A. So much occurred that——

Q. You say you were acting as contact man, you were near the telephone?

A. Yes. Mr. Arlowe was down at the office, I think, seeing if we could get a John Doe warrant without having the names, if I remember correctly, and found that it couldn't be done without actually

(Testimony of Joseph Hallock.)

having the names, which, of course, we didn't have. Mr. Ames went upstairs to see if he could spot what room they were in with his very small concealed receiver which he had then put on, by the way, and he had a hearing aid, something we had made up for the purpose very hurriedly, and we didn't know to what extent it would be sufficient.

Mr. Pomeroy: I will object to this as not being responsive.

The Court: That is sustained. Ask him another question.

Q. What did you do?

A. I stayed in the hotel lobby and asked the telephone operator if—

Mr. Pomeroy: I object to this on the ground it is hearsay, not in the presence of the defendants.

The Court: Do not say what you said to the operator or what she said to you. You can say what you did.

Q. What did you do?

A. I stayed in the lobby of the hotel where I—

Q. I might rephrase the question. What did you see or hear while you were in the lobby of the hotel?

A. I talked to the telephone operator, and if I am saying this correctly, asked her if she—

Mr. Pomeroy: I object to this, if the Court please.

The Court: You cannot say your words stated to her. You cannot relate the words which you



(Testimony of Joseph Hallock.)

spoke to her. You cannot relate here the words which she spoke to you. You can say what you did and the actions you took.

Q. What actions did you take?

A. I satisfied myself from conversation with the telephone operator—

Mr. Pomeroy: I will object to this, if the Court please, about satisfying himself. He has been through these things before.

The Witness: I am trying to cooperate.

Mr. Pomeroy: Just a moment. The Court will rule.

The Court: The objection is sustained.

Q. Did you while in the lobby see any of these three men?      A. I did not.

Q. When did you see these three men?

A. Only here. I know they were down in the Federal Court House after I was down there, but I was in and out and I wouldn't know them.

Q. Did you go up to Room 1217? [362]

A. I did not.

Q. Were you there at any time before or after the arrest?

A. I shortly left the hotel and went back to the office.

Q. Why did you go back to the office?

A. After the arrest.

Q. Why?

A. Because Mr. Ames and I—I beg your pardon, not after the arrest, either, but before the

(Testimony of Joseph Hallock.)

arrest, after he had spotted the room. Then he came on down and met me in the lobby, because we had been coming in and out, Mr. Arlowe had been in and out, and so forth. Mr. Ames came downstairs, met me in the lobby. He then knew what room the boys are in, so we said, "There is no use staying here now and making ourselves conspicuous, and perhaps they will get away before we can get the warrant," so we decided to go back to our own office.

Q. What time did you leave the hotel?

A. I suppose in the neighborhood of about 2:30, on a guess, somewhere in there.

Q. About what time did you arrive at your office?

A. We drove right back. We went and got our car, which was only a block away, drove right back, so that we must have gotten back there in five minutes or so.

Q. How long did you remain at the office?

A. As soon as I got there, I learned that Mr. Arlowe was [363] out trying to get the warrant, so I called Mr. Standard, the assistant manager at the Benjamin Franklin, and said, "Have you any news at all," just thinking that these men, whoever they were, we didn't know at this time, might be trying to get away, and he said in effect that he knew they were going to check out, he got the impression they were going to check out, but he was going to hold their car stub, the garage stub for their car, because they owed him a sizable bill.

(Testimony of Joseph Hallock.)

Q. What did you do in response to that call?

A. So I said, well, that would be—something to the effect that it would be—

Q. I asked you what you did in response to that call?

A. I asked him where the car was. He told me it was in the Motor Ramp Garage, directly behind them. So I then called up the Motor Ramp Garage and asked them, told them that we were just in the process of getting a Federal warrant and I was a Federal officer, and the warrant was just about to be served, and would they be willing to do something to hold that car, do something to it mechanically so if these men came before the warrant reached us, they couldn't use the car.

Q. Did you go up to the garage? A. Yes.

Q. When did you go there?

A. Immediately after he said that he would hold the car. [364]

Q. What time did you arrive at the garage?

A. It is hard to reconstruct; I suppose, on a guess, 2:45, something like that.

Q. What did you do upon arriving at the garage? What did you see and what did you hear?

A. Mr. Ames, when I said I was going up to the garage, in case these men showed up, maybe I could hold them by saying there was to be a warrant for them, Mr. Ames drove and we went up as fast as we could to the garage. He went on to park the car. I went in and immediately introduced

(Testimony of Joseph Hallock.)

myself to the attendant there and told him we expected momentarily some men to come here to get the car, and we were in the process at the very moment, waiting for a Federal warrant for the arrest of these men.

I said it was my hope in coming there that I could tell them I was a Federal officer and attempt to hold them pending this warrant, so he said, "All right, we will cooperate," or something to that effect. Meanwhile, Mr. Ames had come back from parking the car, so Mr. Ames immediately went down to the lower floor of the garage.

Q. Did you go with him?

A. I did not. I stayed on the upper floor.

Q. What did you do?

A. I stayed on the upper floor waiting in case these men or someone came for the car. [365]

Q. Did anybody come for the car?

A. Not at that time.

Q. Did anybody later come for the car?

A. Yes.

Q. When? A. Mr. Donofrio, later.

Q. Did you see him? A. Yes.

Q. Did you hear him speak? A. Oh, yes.

Q. Did you speak to him? A. Yes. [366]

\* \* \*

Q. You say somebody came for the car, a Mr. Donofrio? A. Yes.

Q. Did you see him come for the car?

A. Yes, I saw him come down with the attendant,

(Testimony of Joseph Hallock.)

come down the ramp with the attendant, that is, he came in the upper floor and I was on the lower. When I first saw him he was coming down the ramp with the attendant to get the car.

Q. Was anybody with him other than the attendant?       A. The attendant.

Q. Did you see the car at any time along with him?

A. No, we were already down on the lower floor, the two policemen and I, on the lower floor, keeping this car in sight.

Q. Where was the car in relation to you and the two policemen?

A. About 10 or 20 feet away.

Q. Was anybody in the car at that time?

A. No, not until they came.

Q. Who came?

A. Donofrio and the attendant.

Q. Did you see them approach the car?

A. Yes.

Q. What did you see at that time?

A. As soon as they approached the car, the two policemen [367] and I came out and I questioned Donofrio, standing in front of this car.

Q. Then what occurred?

A. I asked him what he knew about this.

Mr. Pomeroy: Objection.

The Court: Sustained.

Q. What occurred, not what was said?

A. We talked back and forth for a while, and



(Testimony of Joseph Hallock.)

it was agreed that we had no warrant for him, but he would voluntarily come down with us some few moments later to the United States Court House.

Q. Were you there when Mr. Ames arrived?

A. Yes.

Q. When did he arrive?

A. He came over right after the arrest, I guess it must have been almost immediately after, with Mr. Arlowe and Mr. Wood, also of our office, if I remember correctly.

Q. What time did they arrive there?

A. It must have been about 3:30 or slightly thereafter.

Q. Did you see them search the car?

A. Yes.

Q. Tell us about that.

A. The equipment, which Ames had already seen, as he told you, sometime earlier in the afternoon, the equipment was still in the car, so Mr. Arlowe took it out and they took [368] it down to the United States Court House, and Mr. Donofrio went down with someone else and myself. The three of us, one of the boys and myself, we all went down there.

Q. I will direct your attention to Plaintiff's Exhibits 5 and 6 and ask if you can identify those?

A. Yes, I would say that is the same bag that we took from the car, and the same hat box that we took from the car.

Q. Did you look at the contents of the hat box at that time?

A. I did, yes, sir.

(Testimony of Joseph Hallock.)

Q. Did you notice what crystal was inserted, what band crystal was inserted in the transmitter at the time you saw it?

A. It was 3536, and the 3936 was with the gear somewhere, but it wasn't in the transmitter. We commented on it.

Mr. Dore: Your witness.

Cross-Examination

By Mr. Pomeroy:

Q. You called the Seattle police into this case?

A. I called them.

Q. Where did you call them from?

A. I called them from a pay phone there at the Motor Ramp Garage, just outside of their office.

Q. Why did you call them?

A. Mr. Wiltse, the regional manager, suggested I do so because the warrant had then been issued when I called in. [369] I might say this, if I may, it doesn't have any bearing, but my thought in going up there was, as I say, if someone came perhaps we could say, "We are holding you for a Federal warrant," but we knew it didn't yet exist. So when I got up there I called up our office to see if the mechanics of issuing the warrant had been completed and the warrant was in existence and I could say, "I am holding you on a Federal warrant," or attempt to hold them.

When I called the first time the warrant did not exist. They said Mr. Arlowe was meeting some

(Testimony of Joseph Hallock.)

delay in the deputy coming in, or something. When I called a second time, a little later, Mr. Wiltse, said, before I asked him, he said, "I have just heard from Arlowe. There is now a warrant, so you can tell anybody the warrant exists. That being the case, I would suggest you call a couple of local police in, in case you have some trouble."

Q. They were to assist you?

A. That is right, in case there was trouble.

Q. When Mr. Donofrio came down, was he searched?

A. No, I don't recall any search. He immediately took out his wallet, they asked for identification.

Q. Who asked for identification?

A. I think the officer did, or I did, one or the other. I think the officer did.

Q. Either you or the Seattle police officer asked for [370] identification?

A. Yes. I think as we first walked out one of the officers said, "Do you know this man," to me, and I said "No." He said, "Can you identify yourself," or something, and he broke out his driver's license, spread it out like this.

Q. Did anybody go through his pockets, pat his clothes and so forth?

A. I would certainly say not. I wouldn't swear to that, but I don't have the vaguest recollection of that.

Q. Are you sure that is true, nobody did this?

A. I would say that is true.

(Testimony of Joseph Hallock.)

Q. As a matter of fact, do you recall patting him, pulling a newspaper out of his pocket?

A. No, I recall lifting it out, I was just going to say.

Q. Who did that?

A. I think I possibly did. It was sticking out like this, a racing form, right out of his pocket.

Q. You took that out of his pocket?

A. I think I did. I wouldn't say I did, or someone else.

Q. What right did you or anyone else have to do that?

Mr. Dore: I object to that as argumentative.

The Court: The objection is overruled.

A. I suppose none, but I recall this. I said to Mr. Donofrio, "What do you know about this case," something like that, and he said "Not a thing" and just about then I saw [371] this big racing form and I think I pulled it out of his pocket. I probably did.

\* \* \*

Q. Did you know that car sitting down there had the rotor taken out of the motor?

A. Yes. That is, I assumed it did.

Q. Tell the Court and jury what you know about that?

A. As I told the attorney here, when I called up—

Q. I didn't ask you what you told the attorney.

(Testimony of Joseph Hallock.)

I want to tell the Court what you know about a rotor coming out of the engine.

A. I asked the attendant if he would be willing to put that car on the bum so it couldn't be used temporarily, and to hold it until we got this warrant, and he said, "You bet your life I would." I think he or someone later mentioned he lifted the rotor out, just a common thing.

Q. When you made that call for the purpose of stopping that car, Mr. Arlowe was then up at the United States Court House attempting to get a warrant?

A. Yes, he was here getting it. He was in the process of getting it, yes. [372]

Q. Was there a notice put on the windshield of this automobile by you or anyone that was under your jurisdiction or control?

A. Not to my knowledge. But just when you speak of that, while it occurred to me, I think I remember vaguely seeing a piece of paper on the front of that car. Now that you speak of that, that is the first time I remember. I didn't see the paper, but I seem to remember it sticking under the windshield, a piece of paper.

Q. You don't recall what was on that paper?

A. No, but since you mention it, it seems it was a colored piece of paper.

\* \* \*

Q. What you did was ask this attendant to put the car out of commission?



(Testimony of Joseph Hallock.)

A. I did. I said, "If you would be willing to do that, that would help us on a Federal warrant," and he said, "You bet your life."

Q. And you took this paper out of Donofrio's pocket?

A. I think I did. I will take the credit or blame, if such is due. It might have been one of the officers, but I think I did. It said in big letters "Racing form," He said, [373] "I don't know a thing." I said, "But what is that," or something like that.

Q. You weren't arresting him, were you?

A. No. We made it clear we had no warrant for him.

Q. You had no charge against him for anything?

A. That is right. We made it clear, very much so. He was talking voluntarily, and he said very little, he didn't know anything about it but he would come down voluntarily with us.

Q. You are telling the Court and jury that Mr. Standard told you these boys owed a substantial bill at the Benjamin Franklin?

A. That is what I recall, yes, sir.

Q. And they were going to hold the car for the bill?

A. He was holding the stub, I believe, if I remember correctly, holding the garage stub until the bill was settled.

Q. Did he tell you also that they were checking

(Testimony of Joseph Hallock.)

out and that they had baggage taken out to their car?

A. I don't believe he mentioned anything about the baggage. I think he said some such phraseology as they looked rather nervous, or something, and they were going to check out, or something not particularly definite, but he thought they were going to.

Q. Did he tell you they ordered their baggage to be taken out to their automobile? [374]

A. No, I don't remember that. I don't know how they could, because the automobile was in the garage at this time.

Q. I want you to read the affidavit of Mr. Everett K. Ames. Beginning on Line 22 of Page 1 of that affidavit, will you read that sentence beginning with the words, "Shortly thereafter?"

A. "Shortly thereafter the office received a telephone call from Mr. Standard, assistant manager of the Benjamin Franklin Hotel, reporting that the occupants of Room 1217, Ralph Casey, Edward Plesa and George LaClair, were checking out and that they had ordered their baggage taken to their Packard automobile located in the Motor Ramp Garage at Sixth Avenue and Westlake."

Q. If you will look at the next page and notice the date of that affidavit?

A. This is the 25th of August.

Q. That was last week, is that right?

A. Yes.

(Testimony of Joseph Hallock.)

Q. Mr. Ames wrote that, he was referring to the telephone conversation that you had with Mr. Standard, is that right?      A. That is right.

Q. Where did Mr. Ames get that information he put in that affidavit?

A. I suppose because he was standing there in the office with me. [375]

Q. Didn't you tell him about the conversation you had?

A. He was right there, as I remember, standing right by my desk.

Q. Didn't you tell him about the conversation?

A. Oh, naturally.

Q. Therefore, you told him what he has put in this affidavit?

A. I might have, but I certainly don't recall about the baggage. I am just giving the best recollection, I don't recall whether the baggage was mentioned by Mr. Standard. Mr. Standard is here and he will no doubt tell you, but I can't recall.

Q. Please just answer the question. Were you in the room when Mr. Ames testified?      A. Yes.

Q. Did you hear his testimony about your going back to your office shortly prior to 2 o'clock in the afternoon?      A. Yes.

Q. And your testimony now is that you went to the office at 2:30. Which is correct?

A. I don't know, counsel, I couldn't tell you. It was seven months ago. Within half an hour, I don't know.

(Testimony of Joseph Hallock.)

Q. You don't recall?

A. I certainly do not.

Q. But at least you stayed in your office for some considerable period of time? [376]

A. Well, I don't recall that it was very much, because I called Mr. Standard and then I immediately called this garage.

Q. Then you went back to the garage, didn't you?      A. Yes.

Q. How much time did you spend in the garage before Mr. Donofrio showed up?

A. Well, it must have been quite a while.

Q. How much, would you say?

A. Without anything to connect it to, it seems to me that I would guess it between 30 and 45 minutes.

Q. Possibly longer? You sat in the prowl car for a while, too, didn't you?

A. Yes, but not very long, I don't think. It seems to me I wouldn't guess it over 45 minutes.

Q. Mr. Ames went out in the street for a while looking for a policeman, didn't he?

A. Yes, he went out and then came back.

Q. And you were waiting all that period of time?

A. Yes, I was waiting upstairs, thinking some of these fellows might come in and maybe I could hold them. I had my badge to show who I was.

The Court: We will take a recess in these proceedings until tomorrow morning at 10 o'clock.

(Testimony of Joseph Hallock.)

The jury will retire until then. Court is adjourned until tomorrow morning at 10 o'clock. [377]

\* \* \*

JOSEPH HALLOCK

Cross-Examination

(Continued)

By Mr. Pomeroy:

Q. Do you recall putting a slip of paper or a notice on this automobile to hold it?

A. No, sir, I did not.

Q. Did you know that had been done? [378]

Q. As I told you, I am quite certain I saw a piece of paper on the windshield. I think I did, I am pretty sure that I did.

Q. Did you order that done?

A. No, sir, I did not.

Q. You don't know anything about it?

A. No, sir, I do not.

Q. You mentioned yesterday that there broadcasts which said "Post time," you heard it at night?

A. No, the one at night was no racing information.

Q. No racing information? A. No.

Q. You are the assistant in charge of this office, are you, for the Federal Communications Commission? A. Yes.

Q. What was your theory of this case, that these men were betting on horse races?



(Testimony of Joseph Hallock.)

A. Well, it seemed quite apparent to us, yes, that they were doing just that.

Q. Do you know where they were betting?

A. Mr. Arlowe saw one or two, as has been testified. We presumed that any of various downtown bookies, we presumed they were.

Q. Are there downtown bookies?

A. I suppose so. [379]

Q. You say Mr. Arlowe saw somebody someplace. Where was that?

A. I think his testimony has been given.

Q. I am asking you the theory of your office on this. Mr. Arlowe saw them where?

A. He saw them down near Franco's Cafe, I believe. When they said "Go to Franco's," I believe he went up to Franco's, thinking that he might see someone with a hearing aid, and did.

Q. Is it a bookie place there?

A. I don't know.

Q. You don't know if there are any bookies in Seattle? A. I don't know.

Q. If there are no bookies, they couldn't bet, isn't that right?

A. I would think so, yes.

Q. But that was the theory of your office, that these men were betting on horse races?

A. Yes. Well, it wasn't a theory, I mean, it was a foregone conclusion, in our minds, anyway. They gave it, as we have told, day after day. They gave each winner, with much excitement, and

(Testimony of Joseph Hallock.)

many times over and over, so the presumption was that the man with the hearing aid would walk in right to the bookie and play his bet.

Q. You didn't know whether or not there were bookies in Seattle? [380]

A. No, sir, I do not.

Q. You didn't know it then?

A. No, sir, I do not.

Q. And your office didn't know?

A. Not with any positive knowledge, any more than you assume that those things go on in any town.

Q. You assume that they go on?

A. Yes, sir.

Q. Was there any investigation on this case or cases similar to this during this period of time in any other city in this locality, in the Western District of Washington?

A. Not investigation, but I think we had one tip—I know we had one report from the Everett police that several men had taken local bookies for, I believe, several thousands by radio.

Q. The Everett police told your office?

A. I believe I am correct in that.

Q. That somebody had taken one bet, you mean, from local bookies? You mean Everett local bookies?

A. For several days they had taken local Everett bookies, over a period of days, for a two or three thousand dollar total, I believe, was mentioned.

(Testimony of Joseph Hallock.)

Q. And that was in Everett, Washington? When did you receive that information?

A. I didn't receive that personally, but it seems to me [381] Mr. Arlowe or someone received it just about—almost a day before we started on this case, just about the day before, I think.

Q. What date would that be?

A. The day we actually started listening for these signals was the 2nd of February, so I think that is the day we got this report.

Q. The 2nd of February?

A. I believe it was, or within a few days before that.

Q. Were there any other sources of information that you had about betting or horse races when you were conducting the investigation of this particular case?

A. Well, this local amateur, I believe, has been mentioned in testimony, I haven't been here all the time, a local amateur who said that he heard them, I believe, February 1 or approximately that time talking about racing information and giving the name of a horse. I think that is in the record.

Q. Is that on a different wave length than what you claim these men were broadcasting?

A. No, I believe, to the best of my recollection, that was also on the 3936 kilocycles, which was the frequency they used the first day we heard them.

Q. That is you allege these men used that 3936?

A. That is the first day, yes.

(Testimony of Joseph Hallock.)

Q. And the broadcasts you heard came over another frequency? [382]

A. Thereafter they used 3536 continually for the whole rest of the case. They put in the other crystal, yes, sir.

Q. Did your office attempt to find these bookies or find out if they were betting here?

A. No, we had no interest in the racing. We were interested only in stopping the unlicensed radio transmitter which might be used for sabotage or some other purpose. We have no interest in what they do as to betting, the bookies, we have no interest in that.

Q. Your interest is in the sabotage?

A. We are interested in any unlicensed radio transmitter.

Q. In the course of your investigation, did you ask for the cooperation of local authorities, as far as bookies were concerned?

A. I think so—I say I think—a lot of water has gone over the dam. I think we probably talked to somebody, perhaps Mr. Wiltse did, and asked if they could tell us off the record where we might hang around some bookie establishments looking for these men, but I don't believe that any definite addresses of positively known bookies were given to us. I say I think, because I didn't do that. I believe the regional manager, Mr. Wiltse, did that.

(Testimony of Joseph Hallock.)

Q. Do you know whether or not such establishments are [384] legal or illegal in the City of Seattle?

A. I presume they are illegal. I have never heard of their being legal or I suppose they would be wide open with signs on them, doing an immense business.

Q. They are not wide open with signs on them?

A. Not to my knowledge.

Q. You have never seen one?

A. I have not.

Q. You just presume these things?

A. Absolutely.

\* \* \*

### SAM STANDARD

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Dore: [385]

\* \* \*

Q. What is your business or occupation?

A. Assistant manager at the Benjamin Franklin Hotel.

Q. Were you the assistant manager at the Benjamin Franklin Hotel on or about February 10, 1949?

A. I was.

Q. On or about that time, did you see any of



(Testimony of Sam Standard.)

these three men, these three defendants, in your hotel?

A. I saw them on October 10.

Q. On what date?

A. I am sorry, on February 10.

Q. Where did you see them at that time?

A. In the lobby of the hotel.

Q. Did you at any time talk to them?

A. Once, to my knowledge.

Q. When was that and where?

A. In the lobby. I asked Mr. Casey if he were intending to check out that day, as his suite was on reservation.

Q. What did he say? A. He said no.

Q. Did you observe them any other time during the day?

A. Well, I observed them that afternoon. They were around the lobby quite a bit of the 10th. [386]

Q. Were you looking for them that day?

A. I was watching them, yes.

Q. What did you observe at this time?

A. Well, I don't know exactly what you mean, but the fact, possibly, that they were apparently under a nervous strain.

Mr. Pomeroy: I will object to that as a conclusion, rather, not being responsive to the question.

The Court: The objection is sustained.

Q. When and where did you see them at the time you refer to?

A. Well, in the lobby, Mr. Dore.

Q. What part of the lobby, Mr. Standard?

(Testimony of Sam Standard.)

A. They were on the mezzanine for a while, they were in the coffee shop, in and out of the front door.

Q. What were their mannerisms at that time?

A. Nervous condition.

Q. Did you see any luggage?

A. No, I did not.

Q. About what time of day was that?

A. I am not sure. I think it was from 2 o'clock, maybe from 2 to 5, or 4, whenever they were picked up.

Q. Did you see these men after they were arrested.

A. I saw them go out under arrest.

Q. With Marshal Scully?

A. That is correct. [387]

Q. About what time was that?

A. I should have refreshed my memory. I don't know, it was about 5:30, perhaps 6, when they were taken down, sometime in the late afternoon.

Q. Did you give any information over the telephone to the FCC authorities on that day concerning the defendants?

A. Yes, I called Mr. Hallock and told him that apparently they were going to check out or leave without checking out, from their actions.

Q. Was a bill owing at the hotel at that time by the defendants? A. Yes, it was.

Q. Do you know what amount?

A. Yes, approximately \$30 between them.

(Testimony of Sam Standard.)

Q. Did you give any orders to hold their car for that bill?

A. Well, I didn't give any direct orders to hold their car for that bill, but I refreshed the garage's memory that they were supposed to hold the car until they had the claim check on the car, which is the equivalent.

Q. You had the claim check? A. We did.

Q. And you held that during that day, did you?

A. I didn't hold it. It was there and if they had asked for their claim check, I probably would have asked for their bill. [388]

Q. What is the general procedure as to claim checks concerning the cars in the garage and the bills that are owed by the tenants of the hotel?

A. Well, I never have had to actually hold a car on a bill. I don't know whether I could do it legally, Mr. Dore. I have never checked on that, but I know that the cars are picked up by the garage, often, and the claim check then is left in the key box of the guest, and they will pick it up when they want to pick up their car.

Q. Was the claim check of the defendants in their key box on that day?

A. It was in their key box, 1217 suite.

Q. When a bill is owing and there is a claim check in a box and a person is checking out in your hotel, is the fact that he is checking out reported to you if a bill is owing?

A. Do you mean——

(Testimony of Sam Standard.)

The Court: Read the question.

(Last question read by reporter.)

A. Well, certainly it is reported. If anyone attempts to check out at any time and they owe a bill, it is always reported to me immediately.

Mr. Dore: That is all.

### Cross-Examination

By Mr. Pomeroy: [389]

\* \* \*

Q. What hours were you working February 10, 1949?

A. Nine in the morning until about six in the afternoon.

Q. What hours are you working now?

A. About seven in the morning until three in the afternoon.

Q. And you think it was about 5:30 in the afternoon when these men were arrested?

A. I don't remember that far back. I am sure it was before I went home at six. I was interested enough, if it had been a little after six, I probably would have stayed, in fact, I would have had to stay until the case was settled.

Q. Would you say I would be in error if I told you they were arrested about 3:20 in the afternoon?

A. No, it would just surprise me. I didn't think it was that early.

Q. Do you think it might have been about 3:20?

(Testimony of Sam Standard.)

A. I know it was in the afternoon, I know it was before I went home.

Q. Prior to the arrest, had you observed these men around the hotel?           A. I had.

Q. Where?

A. In the lobby, in the coffee shop, on the mezzanine floor. [392]

\* . \* . \*

Q. Did you ever talk to these men?

A. Never except the one time I mentioned, Mr. Casey.

Q. When was the last time that they had paid on their bill prior to the time you called the Federal Communications Commission office? [393]

A. Paid the bill on the 9th.

Q. The day before?           A. That is correct.

Q. Were they paid up in the room rent through that day then?           A. That is correct.

Q. What made you think they were checking out?

A. Well, if I told you, it would be objectionable; I mean, it wouldn't be acceptable. It is merely because I am in the hotel business and we know when people act like they are going to leave, or we get a feeling about them. I had a very distinct feeling about them, and besides, I knew they were wanted by the law and I wanted my money before the law picked them up. All I was interested in was my bill.



(Testimony of Sam Standard.)

Q. You collected money from them to give them a room in the first place, didn't you, personally?

A. I may have, I didn't know them at that time. Did I personally register them in, do you mean?

\* \* \*

Q. They were nervous before they were arrested? A. Yes, sir.

Q. How did they show this nervousness, or was it just a feeling that you had?

A. I will give you a good description.

Q. All right.

A. Mr. Casey and I believe Mr. LaClair, I am not sure, walked along the front of the desk and apparently they thought—well, I don't know what they thought, maybe someone was in the back check-room—and as they walked by the desk with very straight faces they would look out of the corner of their eyes and see what they could see in there. Apparently they thought there might be a policeman in there. There wasn't at the time, but I knew they were being watched.

Q. You knew they were being watched so you watched them, too?

A. No, I was interested, watching them.

Q. To your mind, when they glanced to one side and looked, that was a nervous gesture?

A. It certainly wasn't the way the other guests act.

Q. All other guests walk in and look straight ahead?

(Testimony of Sam Standard.)

A. Have you ever observed anyone looking as hard as they can out of the corners of their eyes without turning their head? When two men do that and you look at them, it is quite an obvious attempt to—— [395]

\* \* \*

Q. As a matter of fact, you knew that these men were being checked on by the Federal Communications Commission? A. That is correct.

Q. And you kept watching them? Did they try to hide any place? A. No, sir.

Q. They sat up there on the balcony and talked to some people, five of them?

A. At one time.

Q. They were in plain view from the desk?

A. Correct.

Q. They were in the coffee shop, weren't they?

A. Correct.

Q. And they walked right in and out of the lobby past your desk? A. Yes.

Q. Was there anything to indicate to you that they were hiding or attempting to run away? [396]

A. No, I am afraid that there wasn't, except my own feelings.

Q. That was because you knew that the FCC men were looking for them, and you became part of that system when you called the FCC office and gave them information, isn't that right? You became a detective yourself?

A. Well, you could say that, of course. I called

(Testimony of Sam Standard.)

them because I thought they were possibly going to leave.

Q. You were quite conscious of the presence of these men in your hotel at the time you observed their arrest, is that true?      A. Yes. [397]

\* \* \*

### GERTRUDE SULLIVAN

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Dore:

\* \* \*

Q. What is your business or occupation?

A. Secretary to the manager of the hotel.

Q. What are your duties as secretary?

A. Well, they are many. I keep records. [400]

\* \* \*

Q. I will ask you if you have ever seen these three defendants before?

A. I remember the first man to the right in the first row.

Q. The man next to Mr. Pomeroy?

A. That's right.

Q. Do you remember his name?

A. No, I do not.

Mr. Dore: Let the record show that the witness refers to Mr. Casey, seated next to Mr. Pomeroy. Is that agreeable, Mr. Pomeroy?

(Testimony of Gertrude Sullivan.)

Mr. Pomeroy: The record may so show.

Q. When and where did you see him?

A. I was relieving the clerk. I often do that on Sunday morning, and Mr. Casey, is it, came in and registered, asked for Room 1217. When I came on duty in the morning there was a note from the night clerk asking me to move the gentlemen who were in Room 616 and 617 to 1217, but they had checked out, so I cancelled the order. They came back, re-registered and asked me for 1217. It wasn't available.

Q. Did Mr. Casey say anything else to you, or did you have any further conversation with Mr. Casey?

A. Nothing other than when 1217 was available that he should have the room.

Q. What else occurred? You say that was on Sunday?      A. That was on Sunday. [401]

\* \* \*

Q. Did you register these men?      A. I did.

\* \* \*

Q. As a matter of identification, what dates do those records show?

A. They are registered for the first time January 30, I believe about 1 or 1:30 in the morning.

Q. Just the dates, please.

A. January 30.

Q. Any others?      A. No.

Q. Are those the only records you have?

(Testimony of Gertrude Sullivan.)

A. That would be the only registration, yes.

\* \* \*

### RAYMOND TURNER

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Dore: [406]

\* \* \*

Q. I will ask you if you were employed at the Motor Ramp Garage on or about February 10, 1949? A. I was.

Q. Were you employed at that garage on that day, February 10? A. I was.

\* \* \*

Q. Was there a Packard automobile in the garage at that [407] time with a Rhode Island license?

A. There was.

Q. Do you know how many days the Packard had been there? Had you seen it on other occasions?

A. I had seen it approximately a week or ten days before that.

Q. During what hours do you work?

A. At that time I was working from 9:30 to six, if I remember rightly.



(Testimony of Raymond Turner.)

Q. Did you see the Packard automobile on February 10?      A. I did.

Q. When and where?

A. It was in the basement, in Row 2-X, about half way down.

Q. What was the occasion of seeing it?

A. When I come on duty in the morning, I take a mental check of the cars in the basement for over-night, how many lay over, and also I check for vacant stalls, and I remember of it being there in the morning when I went on duty.

Q. Did you have anything to do with that car that day?      A. Yes, I did. [408]

\* \* \*

Q. I will direct your attention to Plaintiff's Exhibits for identification 5 and 6 and ask if you have ever seen those items before?

A. Yes, I have.

Q. When and where did you see those, please?

A. I saw them approximately 2:30 or 2:45 in the afternoon of the 10th.

Q. Where?

A. In the back of the Packard convertible, the one with Rhode Island plates.

Q. Did you at that time see the contents of either bag? [410]

A. I saw the contents of the small beach bag.

Q. Did you see the contents of the large bag?

A. Not at that time, sir.

(Testimony of Raymond Turner.)

Q. Did you later see the contents?

A. Yes, I did.

Q. When and where was that?

A. The contents were still in the Packard convertible, and it was at this time that it was under detention, and I had been requested to open the car.

Q. Who had requested you to hold the car?

The Court: He used the word "open."

Q. Who requested you to open the car?

A. Federal Communications Commission authorities.

Q. Did you open the car?                   A. I did.

Q. What was in it at that time?

A. This beach bag and this overnight case.

Q. Was that the beach bag that is before you identified as Plaintiff's Exhibit 5 for identification?

A. That looks to be the beach bag that was in the car.

Q. Is that the same beach bag that was in the car the first time you saw it?

A. I wouldn't say definitely it is the same one, but it is the very same type of bag, color and everything, that was in the car. [411]

Q. Did you see the big bag the first time you opened the car?                   A. I did.

Q. Did you see the contents of either bag?

A. When the car was first opened, I saw the contents of the small bag.

Q. The second time, did you see the contents of either bag?

(Testimony of Raymond Turner.)

A. I saw the contents of both bags.

Q. As to the little bag, to your recollection, did it appear that the same items were in it as you saw the first time?

A. Yes.

Q. As to the large bag, what did you see at that time, the second time the car was opened?

A. Well, I observed a small radio sending set, a very small, compact, powerful type.

Q. I wish you would direct your attention to the contents of the large bag, Plaintiff's Exhibit 6 for identification. Would you look at that, please? Did you see that in the bag at the time?

A. Yes, sir.

Q. As to the approximate times, to the best of your ability, what was the first time during February 10 that you opened up the trunk of the car?

A. It was between 2:15 and 2:30 in the afternoon.

Q. What time was the second time? [412]

A. It was approximately around 3:45.

Q. Do you recall at what time——

A. I beg your pardon, I made an error there. It was 2:45.

Q. Do you recall at what time the man came over to get the car?

A. The person who took the car out?

Q. Yes.

A. That was around 3:45 or 4 o'clock.

Mr. Dore: No further questions.

(Testimony of Raymond Turner.)

Cross-Examination

By Mr. Royce: [413]

\* \* \*

Q. Directing your attention to February 10, did you at that time receive a telephone call from someone purporting to be from the Federal Communications Commission?       A. I did.

Q. About what time did you receive that telephone call?

A. Around 2 o'clock, if I remember.

Q. Approximately 2 o'clock?

A. Approximately.

Q. In what way did this person identify himself as being with the FCC?

A. I couldn't say definitely, but to the best of my knowledge he identified himself by name and as such and such an organization, and told me the purpose of his call.

Q. Did he identify himself as Mr. Hallock?

A. I believe that was the name that was used.

Q. What did he tell you the purpose of his call was?

A. He asked if we had a certain automobile in storage. I told him we did, and he told me that these men were wanted by Federal authorities and that they were on the way down to apprehend the men at the garage.

Q. Did he ask you to do anything in relation to the car?

(Testimony of Raymond Turner.)

A. I believe in the course of conversation it was agreed to disable the car.

Q. Pursuant to that agreement, what did you do?

A. He was giving me a brief rundown on the purpose of his [415] call before that.

Q. I mean, you said you agreed you would disable the car, did you not?

A. Well, he had asked us to hold the car or disable it in some way.

The Court: Then he wants to know what you did, if anything, in order to disable it.

A. After the call was completed, I went to the basement and went and removed the rotor block and coil wire.

The Court: A rotor block, is that what you said? Can you describe it?

The Witness: I can attempt to describe it.

The Court: Describe where it is, what function it performs.

The Witness: It is a small oblong bakelite block with a metal contact that is placed in the distributor of a car. It is the central nervous system of a car, and it is essential to have this bakelite strip with the metal contactors on it to transfer the electricity from your battery source to the ignition. With this removed, the car cannot be run in any shape or manner.

Q. Did you say you also did something with the wire?

A. I removed a short coil wire.



(Testimony of Raymond Turner.)

Q. The wire from the coil to the distributor?

A. The wire from the coil to the distributor is in two [416] sections, with a radio condenser in between, and I removed the short section from the condenser to the distributor.

Q. In the condition that that car was in after you had done this, would it have been possible to operate the car with the engine?

A. No, it would not.

Q. What did you do with the piece of wire that you removed and the rotor after you removed it?

A. I took them up into the office and placed them in the desk drawer, and the attendant at that time—I don't remember who was on duty, but I passed the general information that those parts were in the drawer if they were required.

Q. Sometime later, did some gentlemen appear who identified themselves as FCC people?

A. Yes, they did.

Q. About how much later was that, approximately?

A. I would say approximately 25 or 30 minutes after the phone call.

Q. Do you recall either of these gentlemen's names?

A. I believe Mr. Hallock was one, and as to the other, I couldn't be positive.

Q. Is Mr. Hallock in the courtroom?

A. Yes, he is seated by the window over there.

Q. This was approximately how much later

(Testimony of Raymond Turner.)

after you took the rotor and piece of distributor wire out of the car? [417]

A. 20 or 25 minutes, that is approximately.

Q. What did they tell you at that time?

A. They came into the garage and identified themselves and asked to be shown the car, where it was situated, and I took them down into the basement, showed them the Packard, and I let them lead on from there.

Q. Did you then take them downstairs to the lower ramp? A. I did.

Q. Did they both go with you?

A. Yes, they did.

Q. What did you do there?

A. They looked at the car, if I remember correctly, they glanced inside of it and behind the seat in the front seat.

The Court: I think he was asking you for what you did, and not what they did.

A. And then I was requested to open the trunk door of the car.

Q. Did you procure the keys and open the door for them? A. I did.

Q. At their request? A. At their request.

Q. What did they do after you opened the trunk door? A. You asked what they did?

Q. Yes. You opened the trunk and what did Mr. Ames and Mr. Hallock do? [418]

A. If I remember correctly, the exhibit here, the beach bag, was laying to one side in the trunk. It

(Testimony of Raymond Turner.)

was unzipped at the time. You could see what the obvious contents were.

Q. They opened the zipper bag?

A. No, they did not. It was already open. The contents were visible. And then the larger case was opened and the contents were observed.

Q. Were there any other bags in the car?

A. No, there wasn't.

Q. Just the two bags?                    A. Yes.

Q. You don't know of your own knowledge how those bags got in that car?

A. Not definitely, no.

Q. You don't know?                    A. Not definitely.

Q. Then what did Mr. Ames and Mr. Hallock do?

A. The luggage was returned to its place, I locked the trunk, kept the keys myself and we returned upstairs.

Q. All three of you returned upstairs?

A. That's right, sir.

Q. Then what did they do when you returned upstairs?

A. If I remember correctly, one person went to get a passing prowler car and the other returned to the Benjamin Franklin Hotel. [419]

Q. You say one man went to get a prowler car?

A. Yes.

Q. You mean a city police patrol car?

A. That's right.

Q. Did the city police patrol car show up there?

(Testimony of Raymond Turner.)

A. Yes, it did, within about 10 minutes, I believe.

Q. How many policemen were there in it?

A. Two.

Q. Were they in uniform or plain clothes?

A. They were in uniform.

Q. What did they do?

A. There was a brief discussion, I believe, with Mr. Hallock, and they went in the basement. I went about my duties, I didn't pay any attention to what the conversation was.

Q. When you say the policemen went to the basement or the lower level, do you mean they took their patrol car with them?      A. Yes, they did.

Q. Did they give you any instructions?

A. Not at that time. It was after the patrol car went into the basement.

Q. I mean after the police car went into the basement, did the policemen give you any instructions?      A. The policemen, no.

Q. Who did? [420]

A. Mr. Hallock.

Q. What instructions did he give you?

A. If I remember correctly, I was told if anybody come to claim the Packard automobile I was to take them into the basement and have them indentify the car.

Q. Were you told to inform the police, give them a nod or anything like that, so the policemen would know who the man was?

A. I was told, when this party come for the car,

(Testimony of Raymond Turner.)

I was supposed to arrange a signal of some sort for them so they would know he was after that particular car.

Q. Did someone come for the car?

A. Yes, he did, sir.

Q. What did you do about that? Was it a man or woman?

A. I asked him to go into the basement with me to identify the car and to be sure that it was his own. So, if I remember correctly, the man said he was glad to, and went with me. We went into the basement and I took him to the side of this Packard automobile and I nodded my head, and these two policemen and the FCC man took over.

Q. What do you mean, took over?

A. They left the patrol car, and the gentlemen that I had with me, Mr. Donofrio, I believe it was, they started to frisk him and ask him questions.

\* \* \*

Q. Would you explain to the Court and jury what you mean by frisk?

A. Well, in police procedure, they had him raise his hands and patted him on the pockets and legs to see if he was carrying any weapons, I believe it was.

Q. Did they remove anything from his pockets?

A. I believe that there was a racing sheet half-way out of his pocket that was removed, a standard racing form.

\* \* \*

The Court: Plaintiff's Exhibit 4 is withdrawn and returned to Mr. Dore who produced it. The



next two exhibits are treated together in the evidence, or approximately so, and may be said to be related, Plaintiff's Exhibits 5 and 6.

Mr. Dore: Those should be admitted, Your Honor, under the testimony Your Honor has heard here. I think the only question is a matter of search and seizure, which has previously been argued.

Mr. Royce: If Your Honor please, it is true as Mr. Dore has stated that this matter has been argued before Your Honor on affidavits. At the present time there is, as we promised at the beginning of the trial when the exhibits were offered by the Government, further testimony as to the particular search and seizure of these articles. I would like to draw Your Honor's attention to the testimony particularly of three men, Mr. Hallock, one of the FCC men, Mr. Turner, the garage attendant, and Mr. Standard, the hotel assistant manager.

Mr. Hallock testified that while the other members of the party were attempting to secure a warrant for the arrest of these gentlemen, that he made a phone call to the Motor Ramp Garage and asked the attendant there to hold or disable the car. This is prior to the time that any warrant had ever been issued for these gentlemen. [435]

The garage attendant testified that in response to this phone call, he went down and took the rotor out of the distributor of the car. He also took a short portion of wire running from the coil to the distributor, and that as a result of that, the car was effectively disabled.

In addition to that, without the aid of a warrant,

Mr. Hallock procured two Seattle policemen who drove their prowl car down there and parked their car near this particular Packard automobile. Then when Mr. Donofrio came to the scene, these policemen and Mr. Hallock came out. Mr. Hallock says he didn't search him, but he does admit he took a newspaper out of his pocket. A disinterested witness said the man had his hands over his head and the policemen patted him. Maybe Mr. Hallock doesn't recall that.

It is our position, if the Court please, that the seizure of this car took place at the time that the garage attendant, the agent of the Government, took the rotor out of this car. The car couldn't have been moved, and they further took possession of this car by putting the police officers down there. I think the Government's intention in the use of these police officers, and Mr. Hallock's intention, is clearly shown by the fact that when someone showed up in the vicinity of this car, they said they didn't arrest him. Well, I submit to Your Honor [436] that they did arrest him. You don't have to put a man in jail to put him under arrest. You merely have to hold him against his will. I submit to Your Honor, if you yourself were walking down the street and a police officer makes you put your hands up, pats you, takes a newspaper out of your pocket, that you are under arrest.

Thus we say that the seizure of this car was made before the warrant was issued. What grounds did the Government have to make this search and seiz-

ure? Mr. Hallock testifies that he got a phone call from Mr. Standard. Mr. Standard admits making the phone call, but he admitted on cross-examination that he had no reason to believe that these men were checking out or were going to make their escape. First he said they acted suspicious, to his inner sense of the hotel man, they looked out of the corners of their eyes, but he finally testified he had no grounds to believe these men were going to check out.

Consequently, I submit to Your Honor that the seizure of this car took place before the warrant was issued. It took place without reasonable grounds for the seizure of the car, and is therefore illegal, and the evidence, Plaintiff's Exhibits 5 and 6, should be suppressed, and any evidence in connection therewith.

Mr. Pomeroy: May I add one point to that, Your Honor?

The Court: You may do so. [437]

Mr. Pomeroy: That is that the officer Hallock was at this garage from approximately 2:40 in the afternoon, when he knew Mr. Arlowe was up before the United States Commissioner, that this man, the assistant in charge of this office, could have by a telephone call procured a search warrant, that that car was under his control from then until it was opened by Mr. Arlowe at 3:20, practically an hour, when he made no attempt whatever to obtain a search warrant, at least 40 minutes before the warrant of arrest was issued.

The Court: Adverting to counsel's comment on the effect of Mr. Standard's testimony, I will say that the Court heard and considered all of Mr. Standard's testimony, that on direct as well as that on cross-examination, and all of it together. The Court also considered the testimony of other witnesses as to what Mr. Standard had said regarding the actions of the defendants, concerning the question of their checking out.

The Court got the impression from the manner of Mr. Standard's testifying near the end of the cross-examination that he was receiving the effect that might be expected to be received from a grilling cross-examination. I do not think he should have received that effect, because I think the cross-examination was fair, but Mr. Standard acted as if he was one that might have considered himself being grilled on cross-examination. I repeat, I do not think he should have felt that way, but I think he did, and he acted like one who was willing to say almost anything in order to bring an end to the cross-examination. That is the way he impressed the Court at that stage of his examination.

I think the taking of the two exhibits by the Federal Communications Commission officers is authorized under the rule of the Carroll case, and if that rule is to be changed, by judicial rule, it must be changed by higher judicial authority than this Court. I do not believe it should be changed. I do not believe it is possible or reasonable or feasible or required by due process of law under the Con-



stitution of the United States or any amendment thereof that automobiles be treated like homes so far as the requirement of search warrants is concerned, and that if some higher judicial authority higher than this Court does establish that as a universal rule, then a large percentage of the proper activities of law enforcement officers might just as well be discontinued.

As I say, I feel bound by the rule of the Carroll case, and feel that it is properly applicable to the circumstances here regarding the taking by the Federal Communications Commission officers of Exhibits 5 and 6 from the Packard automobile in the garage under the circumstances [439] prevailing at the time. I think it was a lawful taking under the circumstances. The objections to those exhibits and each and all the objections, are overruled. Plaintiff's Exhibit 5 and 6 are admitted. [440]

\* \* \*

## DEFENDANTS CASE

Mr. Royce: If the Court please, at this time we would like to renew the defendants' motion to strike the testimony, which motion was made earlier in the trial, and objection taken to the introduction of any testimony or other evidence which would divulge the existence, contents, substance, purport, effect or meaning of any broadcast claimed to be made by these defendants, the motion being based on Title 47, USCA, Section 605, and the case cited to Your Honor, for the reason that under such



statute and citation these communications are privileged, and it is provided that they shall not be divulged, either the contents or the mere existence of such communication, to [443] any person without the consent of the sender, and that the term any person includes a court of law, and that the introduction of such testimony is error and prejudicial to the defendants.

The Court: The motion is denied as to each defendant.

Mr. Royce: At this time, if Your Honor please, I would like to renew our motion for the suppression of the evidence seized from the back of the Packard automobile in the Motor Ramp Garage, being Plaintiff's Exhibits 5 and 6, on the ground that they were unlawfully seized contrary to the laws of the United States, and unlawful search and seizure, and we also move to strike any testimony with reference to these exhibits, including the testimony as to subsequent testing of these exhibits, and all testimony coming from said unlawful search and seizure.

The Court: The motion is denied as to each defendant.

Mr. Royce: If the Court please, at this time we move to dismiss the indictment and each of the counts thereunder as to all three defendants on the grounds as more particularly set out as to all seven counts. The first six counts allege particular transmissions, and the seventh count alleges a conspiracy. The tenor of all of the counts, each of the counts

alleging a particular broadcast and the count alleging the conspiracy, are based on the Government's contention that such broadcasts were done without (a), a license for the station, or (b), a license for the operator.

If the Court will recall the testimony, there is no testimony in this case as to the manner of the issuance of a license to operate a station or the license for an operator, with the exception of these gentlemen who did say they gave tests to operators as part of their duties. The only evidence as to a lack of license on the part of this station or of any of these three gentlemen is the testimony of Mr. Arlowe that he was in the radio section for this district of the FCC and that he had checked his files and that those files embraced his district, and in those files he had copies of licenses issued, and that he had checked those files and found no license issued to these defendants.

There is no testimony eliminating the possibility that these men may have had a license issued back East in some other district, or issued directly from the Federal Communications Commission itself. There is no such evidence. There is no evidence in this case indicating that a license so issued to either a station or an operator would not be valid here in the State of Washington in the territory embraced by Mr. Arlowe's section. Further, the statutes under which these defendants are charged do not set up any procedure whereby such testimony as that [445] introduced by Mr. Arlowe would obviate the fact of their having a license.

It further appears under one of the statutes referred to in the conspiracy count that the Communications Commission, with certain exceptions, may waive the requirement of an operator's license. There is no showing that that was not done. The section I refer to is Section 318 of Title 47. That has not been obviated. I submit to Your Honor that on the particular point, the essential part of the Government's case, that that was an unlicensed station operated by unlicensed operators, that the Government has not proved a lack of license.

I would like to call Your Honor's attention to Count I, which alleges that on the 7th of February at Seattle these three defendants did operate a station without a license. The testimony adduced by the plaintiff in support of this indictment, by their own witnesses, they testified that this station, this transmitter, the voice over the transmitter was calling Eddie, Ralph, Casey. This is the testimony of Mr. Ames on the 7th. The purpose for which the Government introduces that evidence, they hope to connect that broadcast with Eddie Plesa and Ralph Casey.

I submit to Your Honor that as far as Ralph Casey and Edward Plesa are concerned, under Count I of the indictment, that that count should be dismissed under the Government's [446] own testimony. They couldn't be broadcasting when somebody was calling to them. The Government's contention is that this radio receiver in the little reddish-brown bag was being handled by either

Eddie Plesa or Casey down on the street and that somebody was broadcasting. I submit to Your Honor that the men couldn't be in two places at one time, and if the Government's evidence is that this transmitter was transmitting to these people, these two men right here, then they couldn't be there transmitting.

The same thing is true of Count II. Your Honor will recall that Mr. Arlowe testified that the transmitter station was calling Ralph, Eddie, Casey, Plesa; and for that reason again the charge says, "and each of them did." The Government brings this evidence in to show that these men were connected with it. I think they have eliminated Casey and Plesa on that count also.

The same thing is true of Count IV, which is again the February 7th broadcast. The difference between Count IV and Count I is that Count I refers to operating without a station license and Count IV refers to operating without an operator's license, and the same thing is true of that count. The Government has proved itself right out of any case under that count against Casey and Plesa.

The same thing is true of Count V. Count V is again the same date as Count II, and is the difference between [447] the one charge of operating without a station license and the other charge of operating without an operator's license. [448]

\* \* \*

The Court: Gentlemen, I am unable to accept the views of the Government respecting these counts as to which I think there is no evidence which if believed would be sufficient to support a



finding of proof established by the evidence beyond a reasonable doubt, and that is as to alleged overt acts 1, 2, 3, 4, 5, 11, 12, 13, 14 and each and all of them will now be stricken from the indictment and from Count VII thereof. There are stricken from the indictment and from Count VII thereof the following overt acts: 1, 2, 3, 4, 5, 11, 12, 13 and 14. The motion to strike the remaining overt acts alleged in Count VII, [460] namely, 6, 7, 8, 9, 10, 15, 16, 17 and 18 is denied as to each and all of said alleged overt acts. Is there any doubt in the minds of counsel as to the Court's ruling on this motion to strike the overt acts?

The motion to dismiss each and all of the counts is denied as to each and all of the counts. Is there any other motion now pending before this Court as to which the Court has not announced a ruling?

\* \* \*

### GEORGE LaCLAIR

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Pomeroy: [461]

\* \* \*

Q. How many generations of your people lived there?      A. Five.

Q. How many brothers and sisters do you have there now?      A. One brother, one sister.



(Testimony of George LaClair.)

Q. Does your brother have some position of prominence there?      A. Yes, sir.

Q. What is that position?

A. He is president of the school board.

Q. What business is he in?

A. He has a public market, meats and groceries, vegetables.

Q. While you were in Pawtucket, Rhode Island, did you meet Eddie Plesa?      A. Yes, sir.

Q. Tell where, when and how you met him.

A. Well, right close to where I lived, within a distance of a block or two, there is a little business settlement called Penaults Corner. Nights after the races—the racetrack is only a quarter of a mile from where I live—all the boys employed at the racetrack and the local residents stand around and talk, moving pictures, bowling alleys, and so forth, around there, and we became acquainted. So rooms were at a premium at this time, and I had an extra room in my home, and he asked me if he could rent the room, and he stayed with us all during the summer, during racing season. [464]

Q. How long did he live with you?

A. I believe it was from around February, April, up to the latter part of November of that year.

Q. That was when?

A. I believe it was 1943.

(Testimony of George LaClair.)

Q. Did you see Eddie Plesa much after November, 1943?

A. I seen him the next year when he came back there. He went away that winter to ride, I believe, to Florida. The next year I seen him when he came back to ride.

Q. Did he live with you when he came back the next year?      A. Yes, sir.

Q. How long did he stay that year?

A. I believe he was just there for the Narragansett meet, I think that was 45 days.

Q. How old were you at that time?

A. About 26 or 27.

Q. Do you know how old Eddie Plesa was at that time?      A. Very young.

Q. About 16, wasn't he?

A. He claimed he was 18, but I think about 16.

Q. Did you see him again after 1944 until recently here in the State of Washington?

A. I believe I seen him in 1945.

Q. Where was that?

A. In Salem, New Hampshire. [465]

Q. What was the occasion of that meeting?

A. He was there at the races, and I happened to go up there one day, and ran into him.

Q. Then you didn't see him until you came out to the State of Washington?

A. Until I came to Lacey, Washington.

Q. Did you have occasion to have correspondence with him during the period of time when you didn't see him?

(Testimony of George LaClair.)

A. We corresponded not too regular, maybe three or four letters a year.

Q. Where did you send your letters to him? Where was he?

A. He worked for Mr.—one time I was writing to him, he was working for Louis Mayer, the motion picture magnate, at Perris, California. Another time, I believe it was Fairgrounds, New Orleans, he was at the racetrack there.

Q. And he has always been connected with races, so far as you know? A. Yes, sir.

Q. Did you become ill while you lived in Pawtucket? A. Yes, sir.

Q. What was your trouble? Briefly tell the Court and jury.

A. I had a very severe attack of gastric ulcers.

Q. Did this occasion any special treatment?

A. Yes, sir. I was put in Massachusetts General Hospital.

Q. How long were you required to take treatment for this [466] trouble you had?

A. A year and a half.

Q. Did you remain in Pawtucket or did you go back to your home?

A. Well, I came back home after, I believe, six months. I moved back to Fort Edward, New York.

Q. Have you continually had trouble resulting from this original illness you had?

A. I haven't been bothered in the last year or so with my stomach. It has been pretty good for the last couple of years.

(Testimony of George LaClair.)

Q. Did you have an accident in 1947?

A. Yes, sir.

Q. Tell us something about that. What injuries did you receive as a result of this automobile accident, or was it an automobile accident?

A. It was an automobile accident.

Q. Tell us something generally of the injuries you received as a result of that accident?

A. I ruptured both lungs and punctured the right one, and I pulled the ligaments away from five vertebrae in my back. I was paralyzed for eight weeks.

Q. Did that incapacitate you from doing any strenuous work of any kind?

A. I was laid up pretty near a year. [467]

Q. When were you finally able to go back to work?

A. That was in 1947, and I guess I was laid up about seven or eight months. I went to Lake George in New York, I went to work for a Mr. Bolton. I worked two days and ruptured my appendix. I was put right back in the hospital for another six weeks.

Q. When were you able to go back to work?

A. I didn't do anything then up until I started for here right after Christmas.

Q. Did you do any work for your brother in the store?

A. I did help him out occasionally over the weekend or something like that if he was busy.

Q. That was during the year of 1948?

(Testimony of George LaClair.)

A. Yes, sir.

Q. Do you know Ralph Casey, one of the other defendants in this case? A. Yes, sir.

Q. How long have you known him?

A. Since we went to school, 14 or 15 years old, through high school.

Q. Where was that high school?

A. He went to South Glens Falls and I went to Fort Edward.

Q. How well did you become acquainted with Ralph Casey? A. Real well.

Q. Did you do things together, visit with each other? Tell [468] us something about that.

A. We caddied together at the Glens Falls Country Club, and we competed in sports together, and then we got out of school, we fooled around together.

Q. During the time you were in Pawtucket, did you see him then? A. No, I never did.

Q. Where was he during the time you were over there in that war work? A. In the Army.

Q. When did you again become acquainted with him, or get to see him, after your work in Pawtucket?

A. Maybe one or two days after he was discharged from the service.

Q. Where was he living?

A. South Glens Falls.

Q. How far is that from Fort Edward, New York?



(Testimony of George LaClair.)

A. About five miles.

Q. Directing your attention to this correspondence with Mr. Plesa, where was he in November, 1948?

A. Lacey, Washington.

Q. Had you ever been out to the State of Washington before?

A. No, sir.

Q. Tell the Court and jury something of this correspondence in November and December, 1948, between you and Mr. Plesa. [469]

A. Well, I hadn't heard from Eddie for, I guess, three or four months, and I got a holiday card, and in the holiday card was a message, a small letter like he usually writes, and he told me it was very lovely country, mild winters, and so on, and told me about this golf club. He said there was a golf club out here, maybe I could rent or buy it, and should be a good thing. It was located very close to a racetrack where he had been riding out here, he knew a lot of people who frequented the place and would go there if somebody he knew had it, and said if I felt like it and could do it, it would probably be a good advantage to me after the holidays to come out and see him.

Q. Had you received any directions from your doctor about your own health or condition in the future?

A. Yes, sir.

Q. What were those instructions?

A. He told me not to do any manual work for two years.,

Q. Did he say anything to you about open air and so on?

(Testimony of George LaClair.)

A. Said it would be very good for me. They wanted me to go to Saranac Lake in New York, but I couldn't go there. It was quite expensive there.

Q. In pursuance of this correspondence with Plesa, did you have occasion to discuss the matter with Ralph Casey?      A. Yes, sir.

Q. Where did those discussions take place?

A. We talked about it right after I got the message from Eddie, and we kept talking about it for a few days. At the holidays, I believe it was Christmas night or the night after, I was at Mr. Casey's home. We talked about it and decided we would leave right after New Year's.

Q. Did you have a car at that time?

A. Yes, sir.

Q. Will you tell the Court and jury what the situation was about the payments on your car at the time you left?

A. Well, I was a little in arrears.

Q. How much money did you and Casey have when you left New York to come out here?

A. I imagine we had six or seven hundred dollars between us.

Q. Why did you talk to Casey about the golf club?

A. Well, because that is his business. He always kind of stood out in golf, and always liked it.

Q. Did he work at it?      A. Yes, sir.

Q. What kind of work did he do in golf?

(Testimony of George LaClair.)

A. His brother was pro at the Lake Lucerne Country Club at Corinth, New York. He used to go over and assist him regularly, give lessons, and so on.

Q. Prior to your coming to Lacey, Washington, had you ever had any experience or anything to do with radio work or equipment of any kind?

A. No, sir, nothing.

Q. When was it you and Casey left New York State to come out here to the State of Washington?

A. Well, it was a week or ten days after the first of the year. I can't remember exactly. I would say about the 10th or 15th of January, around the 15th, I would say, within five days.

Q. Where did you go when you first arrived in the State of Washington?

A. We came in through Seattle, but we never stopped. We went right through to Olympia and I got the directions to Lacey. That is about five miles out, and we went out to the ranch where Eddie was working.

Q. Who was with you when you came to the State of Washington?      A. Casey.

Q. Was there anyone else?      A. No.

Q. And you drove clear out here?

A. Yes, sir.

Q. Did you stop over at all, or come directly?

A. We stopped a couple of times on the way out. It was very cold, it was during the cold wave, and we stopped in Mandan, North Dakota, for a couple

(Testimony of George LaClair.)

of days. Our car froze up on us and we stopped in Miles City, Montana. I believe we stopped there overnight and all the next day until the weather broke. We didn't have western clothes that you need through that country, and we didn't have the car winterized. It was 40° below.

Q. Those were the only stopovers?

A. The first night we stopped in Niagara Falls. We drove across the State of New York to Niagara Falls, and the second night we stopped somewhere between there and Cleveland, a tourist camp. The next night we stopped in Chicago, the next night in Minnesota. Then we drove from Minnesota to Mandan, North Dakota, and stayed there for two or three days. The next stop was Miles City, Montana, and we drove all the way from Montana without stopping, left one noon, drove all that night, all the next day until we got to Lacey, Washington.

Q. Did you register at a hotel when you arrived in Olympia?

A. We went to the farm first to see Eddie.

Q. Then what happened?

A. We came back to Olympia and registered at the Governor Hotel.

Q. How long did you stay there?

A. I think we had to get out of there the next day. I think it was Sunday night when we got here. I think we left the next day, because they said the rooms were taken, the legislature was in.

(Testimony of George LaClair.)

We might have stayed two days, but I think it was only one. It was a question of two there and one at the Olympian, or one there and two at the Olympian, [473] but they wouldn't let us stay over one or two days.

Q. With reference to Plaintiff's Exhibits 5 and 6, the radio transmitter and equipment, when did you first see the items contained in those two exhibits?

A. Well, the items contained in the exhibit I seen the early part of that week. We got there Sunday night, I would say it was either Monday or Tuesday. I didn't see the case, the suitcase I didn't see. I seen the contents of it, but not the suitcase.

Q. Where was it that you saw it?

A. In Olympia, Washington.

Q. Who was present?

A. There was Casey, Plesa, there was two other gentlemen present and myself.

Q. Name who the other gentlemen were.

A. One fellow's name was Johnny Wilcie, and the other gentleman, I don't know his name. I know him by sight but I don't know his name.

Q. Where was it?

A. In a restaurant in Olympia.

Q. Where was this equipment?

A. Johnny Wilcie had it.

Q. Did you have a conversation, all of you together, about this equipment?

A. Yes, sir.



(Testimony of George LaClair.)

Q. Tell what that was.

A. Well, we had been in Olympia a couple of days and we met this party who Eddie knew. I never knew him before, but Eddie knew him, and we were talking about the golf club, and so on, and he said, "I have something you might be able to use to advantage." So naturally we asked what it was, and he told me about this machine that he had that had been used on a shooting range.

Q. Had you ever been around a shooting range?

A. No, sir.

Q. What was said about this machine, the shooting range?

A. He said he had a shooting range where you take rifles, shoot at 100 yards—I don't know what distance they used to shoot at—and he had this machine. He made no bones about it, he showed it to us, had it in a box, and told us that he had used it this way, that people would take targets and set them out on top of bunkers, and apparently he had an employee out there who would be behind the bunkers with the receptive end of this machine, and after the targets were fired, they wanted to change targets, he would notify the person who had the machine to take the targets down. That eliminated any chance of accident, and he told us he was going to Cleveland, and he wanted to borrow some money on it.

Q. Did he ask you for the money or ask Plesa?

A. Well, the first time I ever seen him there

(Testimony of George LaClair.)

was very little discussion brought up about the machine, but the second time, he asked if he could borrow some money on the machine. He asked all of us jointly.

Q. How much money did he want to borrow?

A. \$75.

Q. Then what occurred? Just tell what happened.

A. Well, we didn't do any business with him, we didn't know if we had any use for it, so finally he got to the point where he would take \$50. He said the equipment was worth a couple of hundred dollars, so I bought it for \$50.

Q. Did he show you how to use it?

A. He showed us how to use it.

Q. Did it work?

A. It apparently worked with him.

Q. Just explain how it worked and how he showed you how it worked, and so on.

A. According to him, it was very simple. You just plugged it in and there you had it. You had two points that worked.

Q. Did he speak into the transmitter?

A. Yes, sir.

Q. Who had the receiver?

A. We never did hook the receiver up there. He just showed us how the transmitter worked, and the other part apparently went with it. [476]

Q. What did you do with this equipment after you got it from him?

A. I think we had it a couple of days, and we

(Testimony of George LaClair.)

had checked either in or out of the Olympian Hotel that night, so the next day we were downtown and I happened to see a bag in the window, which was the gray bag that carries it now, and we went in and bought the bag to put it in.

Q. What were you fellows going to do with this equipment?

A. He had a good idea on the shooting range, I thought it was a good idea on the golf club, maybe you could use it some way like that, work in conjunction with a golf range and a shooting range. I don't know, use it some way. He claimed he made quite a lot of money with it. It was fast and saved help and stopped chance of accidents. [477]

\* \* \*

Q. What did you do about obtaining more money in order to buy that golf club?

A. We tried to get some people to go in with us on it.

Q. You finally did get in and buy it?

A. Yes, sir.

Q. How long did you operate this golf club?

A. Well, maybe three months. [478]

Q. Who operated it with you?

A. Mr. Casey.

Q. Casey was out there with you, is that right?

A. That's right.

Q. You didn't purchase it until after you were arrested, is that right? A. Yes, sir.

\* \* \*

(Testimony of George LaClair.)

Q. What did you fellows do with this equipment? Tell the [479] Court and jury exactly where you went to and what you did with it, if you broadcast, where you broadcast to, and all the various things you have heard this testimony concerning.

A. Well, we tried to broadcast, we tried day after day, but we never could make it work.

Q. You never did hear out of it?

A. Never could hear anything.

Q. Did you try to broadcast at the Benjamin Franklin Hotel? A. Yes, sir.

Q. Did you try at the Stratford?

A. Yes, sir.

Q. And you never could hear anything with it?

A. No, sir.

Q. Where were the fellows who were trying to receive?

A. Down on the street, by the windows.

Q. Were they also in the hotel, walking around?

A. Over the halls, and we tried every way to make it work.

Q. And you just couldn't get it to work?

A. No, sir.

Q. Did you broadcast horse races?

A. Well, I can't say as we broadcasted exact horse races. There lots of times have been races or horses mentioned, or things like that. We never tried to broadcast horse racing.

Q. Was your general conversation with Plesa about horses and horse racing? [480]

(Testimony of George LaClair.)

A. Yes, sir.

Q. You heard testimony about "Casey, dance a jig?"

A. Yes, sir.

Q. Did you say that over the transmitter?

A. Yes, sir.

Q. There was testimony about you using the word "homodulation," or somebody doing that. Who did that?

A. Probably was me.

Q. Why did you say "homodulation"?

A. I didn't say homodulation, I just said testing for modulation.

Q. Who told you that?

A. That is what this fellow down there, that we got it from.

Q. What he told you to say?

A. That's right.

Q. Have you ever been in Everett, Washington?

A. No, sir.

Q. Never in your life?

A. No, sir.

Q. Did you ever bet on a horse race with this machine, or use this machine for that purpose?

A. No, sir.

Q. Never did?

A. No, sir.

Q. You never agreed with these defendants to do any of [481] that kind of betting at all?

A. No, sir.

Q. When did you first learn that it was illegal to broadcast?

A. Well, when I was arrested, I suppose, when they came to the hotel room. We were just sitting



(Testimony of George LaClair.)

around there, four of five of us sitting around talking. We had no idea we were doing any wrong.

Q. This man you obtained the machine from, did you talk to him about any license, whether or not you could use this machine, whether it had to be licensed?

A. Never told us a thing about a license.

Q. Never was any conversation about it, is that right?

A. The only thing he said was, "After you get it set up and working, you make an application." I think he might have said that, but I am not sure.

\* \* \*

Q. Were you at any time hiding this machine from anybody?      A. No, sir.

Q. Never tried to hide it?      A. No, sir.

Q. Where was the machine going when it was in your car out there in the Motor Ramp Garage?

A. We decided to bring it to a radio man to try to get it [482] so it would work.

\* \* \*

Q. Directing your attention for the Court and jury to 1939 and 1940, were you engaged in the used car business?      A. Yes, sir.

Q. At that time, you had some difficulty with the authorities, didn't you, over selling cars?

A. Yes, sir.

Q. Tell the Court and jury what that trouble was.

(Testimony of George LaClair.)

Mr. Dore: I object to that, your Honor. We can't retry the trial, if there was a trial, at this trial. We would be here for weeks. The Government would have to go to the expense of obtaining witnesses to come back here and testify as to what they testified in the trial against this man somewhere else. I think it is permissible for the man to mention whether he has been in trouble, whether he has ever been convicted of a crime, but we can't retry the case here.

The Court: Be as brief as possible.

Q. Tell the Court and jury what that trouble was.

A. Well, I bought a piece of property and built a garage, bought cars and I had other cars entrusted to me, and I sold some cars out of trust.

\* \* \*

Q. What were you sentenced to?

A. One to two years.

Q. Was that term suspended?                      A. Yes, sir.

\* \* \*

### Cross-Examination

By Mr. Dore:

Q. When did you say you were convicted of that crime?                      A. I believe it was 1940.

Q. You are sure it wasn't 1942?

A. Well, I guess that was when the trial was, 1942.

(Testimony of George LaClair.)

Q. Were you convicted at the time of the trial or later after the trial? A. At the trial.

Q. You were convicted in 1942?

A. I pleaded guilty. [485]

\* \* \*

Q. Mr. Pomeroy asked you whether this man had showed you how to work it. I believe you said yes, he showed you how to work it? A. Yes.

Q. Did you ever have any radio experience before? A. None whatsoever.

Q. Did any of the other boys?

A. Not to my knowledge.

Q. You say after the purchase of this that you yourself paid for it but that everybody chipped in, is that correct? A. Yes, sir. [488]

\* \* \*

Q. You say you were going to run a golf club and shooting range combination? [489]

A. Yes, sir.

Q. And use the transmitter out there for that?

A. Yes, sir. [490]

\* \* \*

Q. And your common interest was horses, is that correct? A. Yes, sir.

Q. And horse racing?

A. No, I wouldn't say that, just we were friends.

Q. Do you know whether Plesa was engaged in horse racing during that time?

A. That is all he ever done.

Q. You say you broadcast or tried to broadcast

(Testimony of George LaClair.)

with this transmitter and gear at the Benjamin Franklin Hotel day after day, is that correct?

A. Yes, sir. [491]

\* \* \*

Q. Were you at the Benjamin Franklin Hotel on the 7th of February, 1949?

A. I don't remember.

Q. Were you there on February 10, 1949?

A. If that was one of the days I was there.

\* \* \*

Q. Did you try to work this transmitter and radio gear at that time?

\* \* \*

A. I was there for about a week or ten days, however many days I was there. I guess we tried about every day to work it.

Q. On the 5th of February were you at the Benjamin Franklin?

A. I imagine I was. [492]

\* \* \*

Q. During that time at the Benjamin Franklin Hotel, did any of these other boys, Mr. Casey and Mr. Plesa, operate that transmitter?

A. Yes, sir.

Q. They did? A. Yes, sir.

Q. How frequently did they operate it?

A. We would all take turns till we got tired.

\* \* \*

Q. Are you familiar with the names of horses?

A. I know quite a few horses.

Q. Are you familiar with the names of tracks?

(Testimony of George LaClair.)

A. I know quite a few tracks.

Q. You know them pretty well, don't you?

A. Well, pretty good.

Q. In fact, you know them very well, don't you?

A. No, I wouldn't say that.

Q. You are modest. Now, you say that it was you that was broadcasting from time to time?

A. Could have been.

Q. I thought you said it was?

A. I said yes, I broadcasted.

Q. Did you broadcast these broadcasts concerning the names of horses and race tracks?

A. Yes. [503]

\* \* \*

Q. You have heard the testimony here of these witnesses, that you recall during the last few days listening to them. Would you say that it was true or false that these broadcasts concerning these races were usually between 1 o'clock and 3 o'clock in the afternoon?

A. Well, I would say that it wasn't true. We broadcasted every time of the day from 10 o'clock in the morning, 7 and 8 o'clock at night we would still be trying.

Q. On what frequency?

A. That I don't know.

Q. You don't know that?      A. No, sir.

Q. Do you know anything about frequency?

A. I have learned quite a lot here, but that is about all.



(Testimony of George LaClair.)

Q. Did John Wilcie tell you anything about frequency?      A. No, sir.

Q. When John Wilcie sold you that transmitter, did he sell you that 3536 crystal there?

A. Whatever he sold me is there, outside of maybe a battery, a battery or the big bag, we bought the big bag.

Q. I will refer your attention at this time, Mr. LaClair, to Plaintiff's Exhibit 6, the large bag containing the transmitter. I direct your attention to the transmitter contained in that shoe box and ask if that is the transmitter which you say that you bought from John Wilcie? [504]

\* \* \*

Q. For what purpose did they wear that receiver and that equipment?

A. We were trying to make it work.

Q. Why were you trying to make it work?

A. Well, we had bought something, it seems as though it ought to work.

Q. So you decided to work four hours a day at making it work?

A. Well, we had nothing else to do at the time.

Q. You always decided to do that between 1 and 3 o'clock, is that right?      A. No, sir.

Q. Wouldn't you say that most frequently you endeavored to operate this equipment between 1 and 3 o'clock?

(Testimony of George LaClair.)

A. No, sir. We have operated it in the morning, in the evening, Sundays.

\* \* \*

Q. You don't remember? I thought you just said a few [509] moments ago that you had never removed it?

A. That isn't what you just asked me. You just asked me if we only had the one crystal. I don't know if the other one was there or not, I can't remember.

Q. Did you ever see Mr. Plesa or Mr. Casey endeavor to operate this transmitter?

A. Yes, sir.

Q. Was that between the dates of February 2 and February 10, 1949?      A. Yes, sir.

Q. Where did you see them try to operate this equipment?      A. Usually in the hotel room.

Q. Just tell us what hotels, if you recall.

A. Mostly in the Benjamin Franklin.

Q. Mostly at the Benjamin Franklin?

A. Yes, sir.

Q. Where else?

A. At the Stratford Hotel one day we tried to make it work. [510]

\* \* \*

Q. Where would your friends walk when they wearing that apparatus, the receiver and the antenna over their shoulders, and hearing aid?

A. Well, they would usually walk down on the street or in the halls of the hotel, some place, usually

(Testimony of George LaClair.)

on the street where I could see them from the window if I was trying to contact them.

Q. I refer to something Mr. Pomeroy asked you, "Do a jig, Casey, do a dance." Do you remember that occasion? A. Yes, sir.

Q. Tell the Court and jury about that, just what you were doing at this time?

A. Well, I was trying to make contact, and just for conversation, I said it.

Q. Just for conversation?

A. That's right. I guess there was some people in the room and I just done it for conversation.

Q. Could you see Casey or Plesa?

A. I could see them.

Q. Where were they?

A. Down on the street.

Q. At what corner? [511]

A. I don't remember. I know I could see them.

Q. Where was your room at the Benjamin Franklin? A. On the twelfth floor. [512]

\* \* \*

Q. Did Plesa ever go down there and walk around like that? A. Yes.

Q. On numerous occasions? A. Yes, sir.

Q. Between the dates of February 2 and February 10 inclusive? A. Yes, sir.

Q. For what purpose did Plesa go down there and walk around the sidewalks?

A. Trying to make it work.

Q. Did Plesa or Casey know as much about this transmitter and equipment as you did?

(Testimony of George LaClair.)

A. I guess we all had about the same knowledge.

Q. Is it correct, you were the one who usually broadcast?      A. No, sir.

Q. Did you all take turns?      A. Yes, sir.

Q. Did you ever see Casey or Plesa broadcast with that transmitter between the dates of February 2 and February 10 inclusive?

A. Yes, sir. [514]

\* \* \*

Q. How much money did you have on your arrival in Seattle, Mr. LaClair?

A. I don't know exactly.

Q. You say that between the two of you you had \$700 when you left New York?

A. Approximately.

Q. Approximately how much did you spend on the way across the continent?

A. I would say \$150 or \$200.

Q. Up to \$200, so you had approximately \$500 when you arrived here in Seattle, between you?

A. Probably. [521]

\* \* \*

EDWARD PLESA

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct-Examination

By Mr. Pomeroy: [529]

\* \* \*

Q. How old were you when you left Omaha?

A. About 13 or 14.

Q. What occupation have you followed since you left home?

A. I took up being a jockey. I took a couple of years exercising horses and learning how, and then I rode.

Q. Then you were a jockey? A. Yes, sir.

Q. You have followed that profession of being a jockey ever since you left Omaha, is that right?

A. Yes, sir.

Q. In that business, have you been in various parts of the United States? A. Yes, sir.

Q. That includes all the major race tracks in the country, is that right? A. Yes, sir. [530]

\* \* \*

Q. For whom are you working now?

A. Frank Brewster.

Q. Where are you employed?

A. Well, I have been employed for him for the last few years, but I am down on the farm now, at Lacey.



(Testimony of Edward Plesa.)

Q. When did you go to Lacey, Washington, to his farm?

A. Last fall after I rode for him at Spokane, and then I went after the Spokane meet, I think it was November 3 or something like that.

Q. And you have been at the farm at Lacey ever since that time, is that right?      A. Yes, sir.

Q. Where else in the country had you worked for Frank Brewster?

A. I have worked for him around California and here the last three summers, and I have worked for him in California.

Q. How long have you known George LaClair?

A. About seven years, I would say, six or seven years

Q. Where did you first meet him?

A. In New England, Providence, Rhode Island.

Q. What was the occasion that caused you to meet him there?

A. I was riding at Narragansett and I was boarding with him, room and board.

Q. With him and his wife and family?

A. Yes, and family. [531]

\* \* \*

Q. How long have you known Ralph Casey?

A. Never met him until he came out here.

Q. You never met him until he came out here?

A. No, sir.

Q. That was in January of 1949?

A. Around that time, yes, sir.

(Testimony of Edward Plesa.)

Q. You were in the room and arrested at the same time George LaClair and Ralph Casey were, is that right?      A. Yes, sir.

Q. When did you first see George LaClair and Ralph Casey this year?

A. They came down to the farm at Lacey.

Q. Prior to that time, had you been in correspondence with George LaClair?

A. Yes, I have written to him occasionally.

Q. What was that correspondence in reference to?

A. The last one was in reference to him coming out and purchasing a golf club, or leasing it if he could.

Q. What golf club did you have in mind when you wrote to him? [532]

\* \* \*

Q. This Exhibit 5 and 6 which is the transmitter, when did you first see that?

A. I seen it a few days after they came in.

Q. And where did you first see it?

A. Down at Ben Moore's poolroom, I think it was.

Q. Just tell the Court and jury the circumstances under which you first saw it.

A. Well, we was down there and we seen this John Wilcie in a restaurant, I think it was, and I played pool with him once or twice before. I have seen him around.

(Testimony of Edward Plesa.)

Q. Was that prior to the time George LaClair and Ralph Casey came to Olympia?

A. Yes, sir.

Q. You saw this man? A. Yes, sir.

Q. Tell the Court and jury what occurred. [533]

A. We went in and was going to start playing pool or something, fooling around in the poolroom there, and he come on and told us he was broke and wanted to leave, wanted to know if he could sell us something, borrow some money at first, and we couldn't give him none, we didn't know him well enough. So he had something he said he would sell us, so we asked him what it was, and he had a couple of boxes in this poolroom right there, and he showed it to us, and told us it was worth more than he wanted for it, and so we wind up buying it. He told us we could use it for a shooting range or something like that. He says that is what it has been used for.

Q. Is that where you got this transmitter then?

A. Yes, sir.

Q. Then you came on up to Seattle with LaClair and Casey, is that right? A. Yes, sir. [534]

\* \* \*

Q. Did you ever hear anything over the transmitter, over the receiver?

A. Never heard anything

Q. Never heard anything? A. No, sir.

Q. Were you going to check out of the Benjamin Franklin Hotel on the day you were arrested?

(Testimony of Edward Plesa.)

A. No, sir. [536]

\* \* \*

Q. Over this transmitter, did you talk about horse races that happened ten years ago?

A. Well, I wouldn't say for sure. I probably mentioned horse racing, though.

Q. Was there some description of a great ride you made many years ago in Rhode Island, something like that?

A. We used to always rib like that.

Q. Talking about Plesa being the greatest jockey in the world, and so on?

A. Stuff like that, yes.

Q. Did you know at any time that you were transmitting over the air?      A. No, I didn't.

Q. You tried to?      A. Yes, we did. [538]

Q. And never heard anything?      A. No.

\* \* \*

### Cross-Examination

By Mr. Dore: [540]

\* \* \*

Q. You say that he sold you this transmitter with the idea that you might use it for a shooting range? Did you ever operate a shooting range?

A. No, sir, never operated anything.

Q. Did you ever buy this golf club?

A. No, I didn't.

Q. Did you ever lease it?      A. I didn't.

Q. Did all of you together ever lease it or buy it?

A. No, I didn't lease it or anything, because I

(Testimony of Edward Plesa.)

went down to the farm and went to work. Mr. Casey and LaClair wound up leasing or buying it.

Q. Did Ralph Casey or George LaClair ever lease or buy it?

A. I think they did. They had it at one time.

\* \* \*

Q. Do you know the location of the Earlington Golf Club? A. Very well.

Q. Where is it?

A. By the race track, about half a mile, I would say. It [542] is over to the main highway there.

\* \* \*

Q. You say Casey lived at the Stratford?

A. Yes, sir.

Q. Do you know how long he lived there?

A. No, a day or two, I think.

Q. How long?

A. A couple of days, I think.

Q. Do you know what days?

A. No, I don't.

Q. Did you visit him when he was there?

A. Yes, I went down and seen him.

Q. Did he have the transmitter there on that occasion?

A. I don't think so. He might have had it there, I didn't pay much attention to where we had it certain days or where de didn't have it certain days. It is too tough to remember what happened nine month ago. [544]

Q. Did you move it around from place to place?

A. Yes, we have had it with us at various places.



(Testimony of Edward Plesa.)

Q. You aren't sure whether it was in Mr. Casey's room at the Stratford or not?

A. I am not sure. It might have been and probably was at times.

Q. It probably was?                    A. It probably was.

Q. Do you have any electrical experience?

A. No, sir. [545]

\* \* \*

Q. Have you ever been convicted of a crime?

A. Yes, I have.

Q. What crime?

A. It was called petty larceny. It was a misdemeanor. It was about trying to make a telephone call for nothing.

Q. When was that?

A. I think that was in the spring of 1948, about January, I think.

Q. Where?                    A. California. [549]

\* \* \*

## LOU AKER

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

### Direct-Examination

By Mr. Pomeroy:

Q. Please state your name to the Court.

A. Lou Aker.

Q. And your first name is L-o-u?                    A. Yes.

Q. Where do you live?                    A. Olympia.

(Testimony of Lou Aker.)

Q. How long have you lived there?

A. About four years.

Q. How long have you lived in the State of Washington?

A. 28 years. [555]

\* \* \*

Q. Did you know Eddie Plesa?

A. Yes, I did.

Q. How long had you known him?

A. About nine months.

Q. When did you first meet him, do you recall?

A. About six or seven months ago.

Q. Was it prior to January of this year?

A. Yes.

Q. Prior to Christmas?

A. Yes, sir.

Q. Did you meet George LaClair and Ralph Casey, these two defendants here?

A. I met them at Ben Moore's.

Q. How did you happen to meet them?

A. Through Eddie.

Q. Do you recall anybody that was around Ben Moore's [556] where you worked by the name of John Wilcie?

A. No I didn't know the man.

Q. Were you present when this transmitter, a big box, was there in the Ben Moore place where you were working?

A. Yes, sir.

Q. Who brought that in there?

A. Well, I wouldn't know.

Q. When did you first see it?

A. Well, it was about six months ago, I think.

Q. I am directing your attention to the time you

(Testimony of Lou Aker.)

met George LaClair and Ralph Casey. Was that box there at that time?

A. Yes, he brought it in.

Q. Who brought it in? A. This fellow.

Q. You don't know his name? A. No.

Q. Is it any one of these three men here?

A. No.

Q. What did he do with it when he brought it in there? A. He left it there.

Q. How long was it left there?

A. I would say a couple of days, maybe.

Q. Did you see this same man around with these three defendants, LaClair, Casey and Plesa?

A. A couple of days later, yes. [557]

\* \* \*

### RALPH CASEY

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

#### Direct-Examination

By Mr. Pomeroy: [560]

\* \* \*

Q. Tell the Court and jury what your connection with golf is.

A. When I was young, I used to do a lot of caddying, and I worked at the golf shop at the Glens Falls Country Club. I always had an opportunity to play golf when I wanted. I liked the game

(Testimony of Ralph Casey.)

very much. My brother was very good, and he was a professional over at Lake Lucerne, on the golf club over there. I used to go over there on the golf club with him.

Q. How far is that from Glens Falls? [562]

A. About 18 miles over the mountain.

Q. Have you done some golf instructing?

A. Yes.

Q. When and where did you do golf instructing?

A. I have done golf instructing at the Glens Falls Country Club, and then I done some out here at the Earlington, and different courses. Lake George, I have done some up there during the summer months. [563]

\* \* \*

Q. Exhibits 5 and 6, you are familiar with the exhibits, aren't you? You know what those are?

A. Yes.

Q. When did you first see those?

A. I seen them down in this poolroom down there. That is the first I ever seen them.

Q. Did you and George LaClair obtain them at that poolroom? A. Yes.

Q. From whom did you obtain them?

A. John Wilcie.

Q. Had you ever seen or heard of him before?

A. No, I haven't.

Q. Had you ever been trained in any radio work?

A. No.

Q. Electrical work of any kind? A. No.

(Testimony of Ralph Casey.)

Q. After you obtained this equipment, which is Plaintiff's Exhibits 5 and 6, did you go out and purchase a bag to carry it in? A. Yes, we did.

Q. Who was with you on that occasion?

A. George LaClair and Eddie Plesa. [565]

\* \* \*

Q. Tell the Court and jury in your own words what you did with this equipment, what the idea of it was, and what you were going to do with it.

A. The thing, if we ever got it working, we was going to have it around the golf club and put in a rifle range and things like that, archery or whatever it was going to be used for around there. That is what we were going to have it for, around the golf club, mostly, and the rifle range.

\* \* \*

Q. What were you doing with this equipment, trying to make it work? Just tell the Court and jury what you did.

A. Just trying to talk over it, see if anybody could hear us, to make it work, and it never worked for us.

Q. After you were arrested in this particular case, did you and George LaClair go into this golf business? A. Yes.

Q. What golf club did you finally acquire? [566]

A. The Earlington Golf Club.

Q. How long did you operate it, do you recall?

A. Yes, approximately three months.



(Testimony of Ralph Casey.)

Q. Did you and George both work out there?

A. Yes. [567]

\* \* \*

Q. What other hotels did you register at?

A. I was at the Stratford Hotel and the Arlington Hotel.

Q. Who was down at the Stratford Hotel with you?

A. Eddie Plesa and some fellows used to come down there.

Q. Were you having people up at your rooms in the Benjamin Franklin all the time?

A. Yes.

\* \* \*

Q. Where were you sleeping at the Benjamin Franklin?

A. On the couch most of the time.

Q. Then you went down to the Stratford, is that right?

A. That is right. [569]

\* \* \*

Q. Then you went to the Arlington, is that right?

A. Yes.

Q. Did LaClair and Plesa know you were at the Arlington?

A. I don't believe they did.

Q. Tell the Court and jury how you happened to go to the Arlington.

A. Well, I just was out one night, and I was doing a little fooling around, playing around. I had someone with me and I didn't want—I just

(Testimony of Ralph Casey.)

signed a different name down there. I didn't want to have her know my name.

Q. And that was down at the Arlington?

A. Yes.

Q. How long did you stay there?

A. I must have been there a couple of days.

Q. Did Plesa or LaClair know you were there?

A. No.

Q. What did you do with that equipment? Did you have it at the Stratford, too? A. Yes.

Q. What did you do with it at the Benjamin Franklin? Tell the Court and jury what you were doing with it.

A. Just trying to get it to work, that's all.

Q. Did you talk into it, too? [570]

A. Yes.

\* \* \*

### Cross-Examination

By Mr. Dore: [572]

\* \* \*

Q. Did you move the transmitter from the Benjamin Franklin to the Stratford?

A. The transmitter was in the car, in the Packard, so it was there and I took it up to the room with me.

Q. At the Stratford? [573] A. Yes.

\* \* \*

Q. When did you buy or lease the Earlington Golf Club?

(Testimony of Ralph Casey.)

A. I don't remember the date that I did buy it or lease it.

Q. I didn't hear you.

A. I don't remember the date that I did lease it.

Q. Did you lease it or buy it?

A. We bought it and I leased the golf course.

Q. You bought what?

A. The golf course.

Q. The golf course, the whole course and club house?  
A. Yes.

Q. What was the contract price?

A. It was around \$100,000, I believe it was.

Q. Where did you get the money?

A. We didn't have no money.

Q. How were you going to pay for it?

A. Well, if we had the business, we was going to pay for it.

Q. Where is the golf club located?

A. It is just about a quarter of a mile outside of Renton, by the race track. [577]

\* \* \*

Q. How many hours at a time did you sit and test the machine and broadcast horse racing over it? [581]

A. I don't know. I would sit there and try and test it until I got sick of it, tired of it.

Q. A couple of hours a day?

A. Two, three, four hours, maybe we broadcast during the morning, night, afternoon.

(Testimony of Ralph Casey.)

Q. How many hours did you spend out with the receiver on the streets?

A. Not too long, just go down, see if we could hear anything. We never heard anything, then we would come back up.

Q. Did you ever receive a signal on or about February 7 directing you to go to Franco's?

A. Never.

Q. Have you ever been in Franco's?

A. Not that I recall.

Q. Do you know where Franco's is?

A. No, I don't know.

Q. You do not know?

A. I believe I know where it is. I have been around there, I think I was in there one time.

Q. Do you remember the occasion?

A. I went to make a phone call.

Q. Can you eat in there?

A. That I couldn't tell you.

Q. Have you ever eaten in there?

A. No. [582]

\* \* \*

### Redirect Examination

By Mr. Pomeroy:

Q. Directing your attention to this Earlington Golf Club, there was a corporation formed for the purpose of purchasing this? A. Yes.

Q. You were to receive stock out of your earnings in that corporation? A. That's right.

(Testimony of Ralph Casey.)

Q. You and George LaClair had no money to put up? A. Nothing at all. [585]

Q. And the down payment for this golf club was put up through the corporation, by other parties in the corporation? A. That's right.

Q. And the down payment consisted of security of real estate that they owned in the City of Seattle? A. That's right.

Q. There was no actual cash passed?

A. That's right.

Q. And payments were to be made so much a month on the balance? A. That's right.

Q. You were the golf pro and running the golf club? A. Yes.

Q. Refreshing your memory, wasn't March 1 when you entered into possession of the golf club?

A. I imagine it was around that time. I don't remember the date. [586]

\* \* \*



HERBERT ARLOWE

called as a witness by and on behalf of defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pomeroy:

Q. You previously testified in this case, in the Government's case? A. That is right.

Q. You are the engineer in charge of the FCC office here? A. I am.

Q. Will you state to the jury what the cost of a license required to broadcast, a license for an operator, is?

A. There is no cost for any license.

Q. How long have you been with the FCC?

A. Since October, 1928.

Q. How many cases of this type have you prosecuted in that time?

A. As I remember, one in San Francisco, one in this court.

Q. That is all during the 20 some years you have been with the FCC? A. Correct. [587]

Q. What is the usual procedure of your office in connection with this type of case? Do you usually talk to the people and ask them about what they are doing, about their operations?

A. No, we don't talk to the people.

Q. If you find somebody who is broadcasting, and so forth, don't you go and talk to those people?

A. We listen to what they say on their radio.

(Testimony of Herbert Arlowe.)

Q. After you find where they are, don't you go and talk to the people?

A. Why, of course not.

Q. You don't talk to them at all?

A. We don't make any point of talking to them.

Q. You don't go and ask them what they are doing, finding out where they are broadcasting, what kind of machine they are operating, or anything like that?

A. We endeavor to obtain proof of their operation before we contact them at all in any manner.

Q. Then do you contact them?

A. Contact them with a warrant for their arrest.

Q. You have only done that twice in 20 years, you say, but don't you go and talk to the people, discuss it with them, find out what they are doing?

A. I can't say that we do, no.

Q. Let's take you back to a case in the North End of [588] Seattle, where a man with a garage was doing a little broadcasting with a wire to his home about a block away. Do you recall that case?

A. Not with a garage, no.

Q. What was he operating? A radio shop, was it?

A. Will you give me the name of the person?

Q. I have forgotten. Do you recall such a case out here about Lake City?

A. I remember the Partridge case.

Q. Is that it?

A. Partridge wasn't operating a garage or store.

(Testimony of Herbert Arlowe.)

Q. What was he operating? Some kind of business, wasn't it?

A. No, I think he was working for somebody else at the time.

Q. Do you have cases where somebody is fooling around with electrical equipment, you go out and find out they are doing something illegal, you talk to them, find out what they are doing, in your investigations out of your office?

A. We determine what kind of operation they are doing, first, whether they have ever had a license, what type of operation they are carrying on. If it looks like they are making a broadcast with an unlicensed transmitter and that they are old enough to realize what they are doing, and if they are using the radio for more than just to test or in preparation for getting a license.

Q. Then you go and talk to them, don't you, and find out [589] what they are doing?

A. No, we don't. We judge from what they say on the air, what they do with it. [590]

\* \* \*

Q. In other words, if any broadcast is just within the State of Washington and doesn't go out into the navigable [591] waters of the United States or across state lines, it isn't a violation of your regulations or laws, is that right?

A. Not exactly right, no.

Q. Will you tell the Court and jury——

A. The communications rules provide that these

(Testimony of Herbert Arlowe.)

low power devices, where the maximum signal is one-sixth of one wave length and at that distance is 15 microvolts per meter, not more, may be used to remotely control radio controlled objects such as garage door operators or other devices that can be operated with a relay. Now, after that rule was adopted, then the manufacturers of phonograph records, phonograph record players, received permission and received type approval numbers for equipment to be used without any antenna, and measurements were made to indicate that on those that received type approval, that the signal did not radiate from that particular receiver, or phonograph oscillator, I should say, more than 15 microvolts per meter,  $1 \text{ over } 2 \pi \text{ times waves length}$ , roughly, one-sixth wave length.

Mr. Pomeroy: Well, I hope everybody understands it as well as I do now. You may inquire.

### Cross-Examination

By Mr. Dore:

Q. Is this similar equipment to the small equipment which Mr. Pomeroy has mentioned and brought into the conversation? [592]

A. I should say not.

Q. What is the difference?

A. This has 30 watts. This would broadcast a signal, a direct signal, by daytime reception that could be easily heard 40 or 50 miles, instead of less than 150 feet. This has power many hundred times greater. A phonograph oscillator is limited.

(Testimony of Herbert Arlowe.)

Q. Is this subject to different regulations than the other?

A. This would be subject to the Commission's regulations, but would certainly not fit within the low power rule. The low power rule would allow maybe only a couple of kilowatts into the tube, the oscillator tube, whereas this transmitter is rated at 30 watts, approximately.

Q. Did these three defendants here ever apply to you for a license to operate any of this small equipment?

A. They did not.

Mr. Pomeroy: I will object, if the Court please. It is improper cross-examination. We admit that they never applied for a license, didn't know they had to have one.

The Court: The objection is overruled.

Q. Did they ever apply to you for any license?

A. They did not.

Q. Do you have any license on file for them?

A. There are no licenses on file for them, either in my office or at the Commission's office in Washington. [593]

Q. Is that for an operator's license?

A. For either operators' or station licenses.

Mr. Dore: That is all.

\* \* \*

Court is recessed until 2 o'clock.

(At 11:59 o'clock a.m., Tuesday, September 6, 1949, proceedings recessed until 2:00 o'clock p.m., Tuesday, September 6, 1949.) [594]



## GEORGE EASTMAN

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Pomeroy: [595]

\* \* \*

Q. Can you tell the Court and jury what is generally considered what a bookie is, or a bookie place, what it is?

A. Well, a bookie place would be a location where a person can place bets on horse races.

Q. That is what is known generally in law enforcement circles as a bookie place, is that right?

A. Yes, sir.

Q. During January and February of this year, were there any such places in operation in the City of Seattle?

A. To our knowledge, there were no regular establishments. I made a check promptly following this arrest, after reading a newspaper account of it.

Q. And there were no such places in existence?

A. No, sir.

Mr. Pomeroy: You may inquire.

## Cross-Examination

By Mr. Dore:

Q. What is the basis of your knowledge, Chief Eastman, on which you base that statement?

A. I have made several statements, sir.

(Testimony of George Eastman.)

Q. Concerning the bookies not operating at that time?

A. Well, I caused an investigation to be made of the possibility of that kind of operation here and there were no open establishments, as I indicated. We have a problem of runners in that field even today.

Q. Do you know of your own personal knowledge whether there were or were not bookie places operating at that time in the City of Seattle?

A. I do not.

Mr. Dore: I will move at this time, Your Honor, to [597] strike all the testimony of this witness. He has no personal knowledge. It is mere hearsay on which he bases this conclusion.

The Court: The Court will let it stand for what it is worth. He has testified on direct and on cross and explained the source of his information and knowledge supporting his answer. The motion is denied.

Mr. Dore: No further questions.

Mr. Pomeroy: That is all.

## HOWARD SWEENEY

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Pomeroy: [598]

\* \* \*

Q. Did you receive a call to go to the Motor Ramp Garage, which is back of the Benjamin Franklin Hotel?

A. We received a call to meet a Mr. Hallock, I believe was the name, at Sixth and Westlake.

Q. Did you do that? A. We did.

Q. After you met this man, where did you go?

A. We went down in the basement of the Motor Ramp Garage, at that address.

Q. Did you go down alone or with someone?

A. I went down with my partner in the prowl car and this Mr. Hallock.

Q. Did you take the prowl car down into the garage? A. Yes.

Q. What did you observe when you reached the downstairs part of the Motor Ramp Garage?

A. Well, our observation, there was several cars parked [599] there, and this Mr. Hallock and another man was there with him.

Q. Who was this other man, do you know?

A. I don't recall his name. He was evidently a partner.

(Testimony of Howard Sweeney.)

Q. Will you stand up, Mr. Ames? Was it Mr. Ames?

A. I believe so. He looks familiar.

Q. What were you told by Ames and Hallock about what you were to do?

A. We were asked to stand by, to assist them, if necessary, in regard to a car that was parked there supposedly with equipment or something that they wished to get.

Q. Did you so stand by with them?

A. Yes.

Q. Did Mr. Hallock stay in the car with you for some period of time?

A. He was in the car there with us, talking.

Q. Do you know whether or not the car which you were supposed to watch had been put out of running commission?

A. No, I do not.

Q. You do not know that?

A. Not to my knowledge.

Q. Were there any signs placed on the car to hold it for any reason?

A. I recall a piece of white paper stuck under the windshield wiper to the effect that the car was not to be moved.

Q. The car was not to be moved? Was that signed by [600] anyone, do you know?

A. Not any name that I recall.

Q. Was it signed by a Government agency, such as the FCC, rather than a name?

A. I don't recall that.

(Testimony of Howard Sweeney.)

Q. Did someone finally come down into this garage in order to go into this car? A. Yes.

Q. What did you do when this man appeared?

A. I went over and talked to him, asked him who he was and what he was down there for.

Q. What did he tell you?

A. He told us he came down to get this car in question.

Q. Was he searched by you at that time?

A. No.

Q. Do you recall whether you frisked him or not?

A. I don't recall frisking him. I asked him if he had any identification as to who he was, and he presented some identification. [601]

\* \* \*

## COURT'S INSTRUCTIONS

Count I of the indictment as returned by the Grand Jury reads as follows:

### “COUNT I

“That on or about February 7, 1949, at Seattle, in the Northern Division of the Western District of Washington, Ralph Casey, Edward Plesa and George LaClair, and each of them did unlawfully, wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio without a station license having first been granted by the Federal Communi-



cations [611] Commission in accordance with Section 301, Title 47, United States Code, authorizing the use and operation of certain apparatus used and operated by the said defendants as aforesaid, and that said defendants did unlawfully, wilfully and knowingly by the use and operation of the apparatus aforesaid transmit energy, communications and signals by radio from one place in the State of Washington, to wit, Seattle, to a place in another state, to wit, Portland, Oregon.”

All in violation of the law.

The defendants have entered a plea of not guilty to Count I. This plea places upon the Government the burden to prove by the evidence beyond a reasonable doubt each material allegation of that count.

There are four material allegations in this count, namely:

1. That the alleged offense occurred in Seattle on or about February 7, 1949.

2. That on said date no radio station license had been issued to Ralph Casey, Edward Plesa or George LaClair by the Federal Communications Commission.

3. That the said defendants did unlawfully, wilfully and knowingly use and operate a radio for transmitting a radio signal.

4. That the said radio signal was transmitted from [612] Seattle, Washington, to Portland, Oregon.

If you find from the evidence beyond a reasonable doubt that these four allegations are true as to all of the defendants, then it is your duty to find all the defendants guilty as charged in Count I. If you find from the evidence beyond a reasonable doubt that these four allegations are true as to two of the defendants and not true as to the third defendant, then it is your duty to find such two defendants guilty of Count I and the third defendant not guilty as to Count I. Likewise, if you find from the evidence beyond a reasonable doubt that these four allegations are true as to only one defendant and not true as to the other two, then it is your duty to find the one defendant guilty of Count I and the other two defendants not guilty as to Count I. Likewise, if you do not find from the evidence beyond a reasonable doubt that these four allegations are true as to any of the defendants, then you must acquit all three defendants as to Count I.

The second count of the indictment as returned by the Grand Jury reads as follows:

## “COUNT II

“That on or about February 5, 1949, at Seattle, in the Northern Division of the Western District of Washington, Ralph Casey, Edward Plesa and George LaClair and each of them did unlawfully, wilfully and knowingly use and operate [613] certain apparatus for the transmission of energy, communications and signals by radio without a station license having first been granted by the Federal Communications Commission in accordance with

Section 301, Title 47, United States Code, authorizing the use and operation of certain apparatus used and operated by the said defendants as aforesaid, and that said defendants did unlawfully, wilfully, and knowingly by the use and operation of the apparatus aforesaid transmit energy, communications and signals by radio from one place in the State of Washington, to wit, Seattle, to a vessel sailing upon the navigable waters of the United States, to wit, Puget Sound." All in violation of the law.

The defendants have entered a plea of not guilty to Count II. This plea places upon the Government the burden to prove by the evidence beyond a reasonable doubt each material allegation in that count.

There are four material allegations in this count, namely:

1. That the alleged offense occurred in Seattle on or about February 5, 1949.

2. That on said date no radio station license had been issued to Ralph Casey, Edward Plesa or George LaClair by the Federal Communications Commission.

3. That the said defendants did unlawfully, wilfully [614] and knowingly use and operate a radio for transmitting a radio signal.

4. That said radio signal was transmitted from Seattle to a vessel upon the navigable waters of Puget Sound.

If you find from the evidence beyond a reasonable doubt that these four allegations are true as to all of the defendants, then it is your duty to find all the defendants guilty as charged in Count II. If you find from the evidence beyond a reasonable doubt that these four allegations are true as to two of the defendants and not true as to the third defendant, then it is your duty to find such two defendants guilty of Count II and the third defendant not guilty as to Count II. Likewise, if you find from the evidence beyond a reasonable doubt that these four allegations are true as to only one defendant and not true as to the other two, then it is your duty to find the one defendant guilty of Count II and the other two defendants not guilty as to Count II. Likewise, if you do not find from the evidence beyond a reasonable doubt that these four allegations are true as to any of the defendants, then you must acquit all three defendants as to Count II.

As to Count III, the indictment charges:

### “COUNT III

“That on or about February 10, 1949, at Seattle, in the Northern Division of the Western District of Washington, [615] Ralph Casey, Edward Plesa and George LaClair and each of them did unlawfully, wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio without a station license having first been granted by the Federal Communications Commission in accordance with Section 301, Title 47, United States Code, authorizing the use



and operation of certain apparatus used and operated by the said defendants as aforesaid, and that defendants did unlawfully, wilfully and knowingly by the use and operation of the apparatus aforesaid transmit energy, communications and signals by radio from one place within the State of Washington, to wit, Seattle, to other places within the State of Washington and the effects of such use and operation extended beyond the borders of the said State of Washington, and caused interference with the transmission of energy, communications and signals from places in other states to places within the State of Washington.”

All in violation of the law.

The defendants have entered a plea of Not Guilty to Count III. This plea places upon the Government the burden to prove by the evidence beyond a reasonable doubt each material allegation as to Count III.

There are four material allegations in this count, namely: [616]

1. That the alleged offense occurred in Seattle on or about February 10, 1949.

2. That on said date no radio station license had been issued to Ralph Casey, Edward Plesa or George LaClair by the Federal Communications Commission.

3. That the said defendants did unlawfully, wilfully and knowingly use and operate a radio for transmitting a radio signal.



4. That said radio signal extended beyond the borders of the State of Washington or the effects of such signal caused interference with transmission of other radio signals from places outside the State of Washington to places within the State of Washington.

If you find from the evidence beyond a reasonable doubt that these four allegations are true as to all of the defendants, then it is your duty to find all the defendants guilty as to Count III. If you find from the evidence beyond a reasonable doubt that these four allegations are true as to two of the defendants and not true as to the third defendant, then it is your duty to find such two defendants guilty and the third defendant not guilty in respect to Count III. If you find from the evidence beyond a reasonable doubt that these four allegations are true as to only one defendant and not true as to the other two, then it is your duty to find the one defendant guilty and [617] the other two defendants not guilty as to Count III. If you do not find from the evidence beyond a reasonable doubt that these four allegations are true as to any of the defendants, then you must acquit all three defendants as to Count III.

The indictment as to Count IV charges:

#### “COUNT IV.

“That on or about February 7, 1949, at Seattle, in the Northern Division of the Western District of Washington, Ralph Casey, Edward Plesa and George LaClair and each of them did unlawfully,

wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio from one place within the State of Washington, to wit, Seattle, to a place in another State, to wit, Portland, Oregon, without a radio operator's license having first been issued by the Federal Communications Commission to said defendants in accordance with Section 318 of Title 47, United States Code, the said certain apparatus used and operated by the said defendants, being then and there set up as a radio station of the style and type for which a radio station license is required." All in violation of the law.

The defendants have entered a plea of not guilty to Count IV. This plea places upon the Government the burden to prove by the evidence beyond a reasonable doubt each [618] material allegation in that count.

There are four material allegations in Count IV, namely:

1. That the offense occurred on February 7, 1949, at Seattle, Washington.
2. That on said date a radio operator's license had not been issued to Ralph Casey, Edward Plesa or George LaClair by the Federal Communications Commission.
3. That the said defendants did unlawfully, wilfully and knowingly use and operate a radio station.
4. That in using and operating said radio sta-

tion the defendants did transmit a radio signal from Seattle, Washington, to Portland, Oregon.

If you find from the evidence beyond a reasonable doubt that these four allegations are true as to all of the defendants, then it is your duty to find all the defendants guilty as charged in Count IV. If you find from the evidence beyond a reasonable doubt that these four allegations are true as to two of the defendants and not true as to the third defendant, then it is your duty to find such two defendants guilty and the third defendant not guilty as to Count IV. If you so find that these four allegations are true as to only one defendant and not true as to the other two, then it is your duty to find the one defendant guilty and the other two defendants not guilty in respect to Count IV. If you do not find from the evidence beyond a [619] reasonable doubt that these four allegations are true as to any of the defendants, then you must acquit all three defendants as to Count IV.

The indictment for and in Count V thereof charges:

#### “COUNT V

“That on or about February 5, 1949, at Seattle, in the Northern Division of the Western District of Washington, Ralph Casey, Edward Plesa and George LaClair and each of them did unlawfully, wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio from one place within the State of Washington, to wit, Seattle, to a vessel

sailing upon the navigable waters of the United States, to wit, Puget Sound, without a radio operator's license having first been issued by the Federal Communications Commission to said defendants in accordance with Section 318 of Title 47, United States Code, the said certain apparatus used and operated by the said defendants being then and there set up as a radio station of the style and type for which a radio station license is required." All in violation of the law.

The defendants have entered a plea of not guilty to Count V. This plea places upon the Government the burden to prove by the evidence beyond a reasonable doubt each material allegation in that count.

That count contains these four material allegations, namely:

1. That the offense occurred on February 5, 1949, at Seattle, Washington.
2. That on said date a radio operator's license had not been issued to Ralph Casey, Edward Plesa or George LaClair by the Federal Communications Commission.
3. That the said defendants did unlawfully, wilfully and knowingly use and operate a radio station.
4. That in using and operating said radio station the defendants did transmit a radio signal from Seattle to a vessel sailing upon the navigable waters of Puget Sound.

If you find from the evidence beyond a reasonable doubt that these four allegations are true as to all



of the defendants, then it is your duty to find all the defendants guilty as charged in Count V. If you so find that these four allegations are true as to two of the defendants and not true as to the third defendant, then it is your duty to find such two defendants guilty and the third defendant not guilty in respect to Count V. If you so find that these four allegations are true as to only one defendant and not true as to the other two defendants, then it is your duty to find such one defendant guilty and the other two defendants not guilty as to Count V. If you do not so find that these four allegations are true as to any of [621] the defendants, then you must acquit all three defendants as to Count V.

The indictment further charges as to Count VI:

#### “COUNT VI.

“That on or about February 10, 1949, at Seattle, in the Northern Division of the Western District of Washington, Ralph Casey, Edward Plesa and George LaClair and each of them did unlawfully, wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio from one place within the State of Washington, to wit, Seattle, to other places within the State of Washington and the effects of such use and operation extended beyond the borders of the said State of Washington and caused interference with the transmission of energy, communications and signals from places in other states to places within the State of Washington, without a radio operator's license having first been issued by the



Federal Communications Commission to said defendants in accordance with Section 318 of Title 47, United States Code, the said certain apparatus used and operated by the said defendants being then and there set up as a radio station of the style and type for which a radio station license is required.”

All in violation of the law.

The defendants have entered a plea of not guilty to [622] Count VI. This plea places upon the Government the burden to prove by the evidence beyond a reasonable doubt each material allegation contained in Count VI.

There are four material allegations contained in that count, namely:

1. That the offense occurred on February 10, 1949, at Seattle, Washington.

2. That on said date a radio operator's license had not been issued to Ralph Casey, Edward Plesa or George LaClair by the Federal Communications Commission.

3. That the said defendants did unlawfully, wilfully and knowingly use and operate a radio station.

4. That in using and operating said radio station the defendants did transmit a radio signal from Seattle, Washington, to points outside of the State of Washington, or that the effects of such signal interfered with the transmission of other radio signals originating outside the State of Washington, and transmitted to points within the State of Washington.

If you find from the evidence beyond a reasonable doubt that these four allegations are true as to all of the defendants, then it is your duty to find all the defendants guilty as charged in Count VI. If you so find that these four allegations are true as to two of the defendants and not true as to the third defendant, then it is your duty [623] to find such two defendants guilty and the third defendant not guilty in respect to Count VI. If you so find that these four allegations are true as to only one defendant and not true as to the other two, then it is your duty to find such one defendant guilty and such other two defendants not guilty as to Count VI. If you do not so find that these four allegations are true as to any of the defendants, then you must acquit all three defendants as to Count VI.

Count VII of the indictment charges the three defendants with having entered into a conspiracy with each other to operate a radio station without first obtaining a station license or a radio operator's license and in so doing to transmit radio signals across a state boundary line, or to vessels upon navigable waters, or to transmit signals which would interfere with the reception of other radio signals originating in one state and received in another.

To this count likewise the defendants have pleaded not guilty, and that places upon the Government the burden to prove by the evidence beyond a reasonable doubt all of the material allegations of such Count VII.

A conspiracy, as the word is used in the conspiracy law and in Count VII of this indictment, is an agreement between two or more persons acting upon a

common purpose to commit an offense, insofar as this case is concerned, [624] the particular offenses, or one of them, described in Count VII.

There can be no conspiracy of any kind unless three elements are present. Those are, first, the act of conspiring together of two or more persons; second, to commit the particular offense charged in the indictment; and, third, the doing of something in furtherance of the unlawful design.

There is no such thing as one person conspiring. A person who alone plans and commits a criminal act is not guilty of conspiracy.

It is not necessary to render a person guilty of conspiracy that he be one of the original persons forming the conspiracy. He may have joined it after its formation and if so he thereby becomes as guilty as one of the original conspirators.

However, to render such a person guilty under such law it is necessary that after he has become a member of such conspiracy, some act be done by one of the conspirators toward carrying out the unlawful agreement of the conspiracy.

In order to establish the guilt of a particular defendant under the conspiracy count it is necessary that the Government prove by the evidence beyond a reasonable doubt first, that the conspiracy was formed as alleged, and that [625] it was entered into by the particular defendant, as charged, and second, that within the jurisdiction of this court, after that particular defendant became a member of such conspiracy, one or more of the overt acts of the conspiracy was committed as alleged in the indictment.

The common design, purpose, agreement and co-operation among the participants are the essence of the conspiracy. To prove that a conspiracy existed and was in operation, it is not necessary that two or more persons entered into a written or express agreement or made any formal declaration acknowledging membership in the conspiracy, but it is necessary to prove by competent evidence beyond a reasonable doubt that they cooperated in furtherance of a common unlawful plan previously formed. Conspiracy may exist either to do something unlawful or to do a lawful thing in an unlawful way.

In order to establish a criminal conspiracy, a corrupt motive or intent must be shown. There must be an evil design, a wrongful purpose.

It is not necessary that the Government establish the time of the formation of the conspiracy exactly. If a conspiracy existed, it ended upon the arrest of the defendants, and no acts done by any one of them thereafter who was a member of the conspiracy can be considered by you.

You will note that Count VII of the indictment purporting [626] to charge conspiracy sets forth a number of so-called overt acts, but you are instructed that mere proof of an overt act, or overt acts, as charged in that count, alone proves no conspiracy, without further proof beyond a reasonable doubt of an unlawful agreement entered into by two or more persons named in the indictment to commit the unlawful acts charged in Count VII; this is true even though evidence shows the overt act or overt acts alleged to be unlawful in themselves.



You are further instructed that such overt act, or overt acts, must be found from the evidence to be clearly referrable to the unlawful agreement, provided you find from the evidence that such unlawful agreement in fact did exist as alleged in Count VII. Even participation in the offense itself which is alleged to be the object of the conspiracy, does not necessarily prove a participant guilty of such conspiracy. There must in addition thereto be proof beyond a reasonable doubt of the unlawful agreement and participation therein by the particular defendant or defendants with knowledge on his or their part of the existence of the unlawful agreement charged in the indictment. These matters must be proved by the evidence beyond a reasonable doubt. The unlawful agreement is the gist of the offense of conspiracy and unless you find two or more of the persons named in the indictment so entered into the unlawful [627] agreement specifically charged in Count VII, and actively participated therein and that one or more of the defendants committed at least one of the overt acts alleged in that count, with knowledge of such unlawful agreement, you are not at liberty to return a verdict of guilty herein with respect to Count VII of the indictment.

You are instructed that a crime may consist of many acts, which must all be committed in order to complete the offense, but each person present, consenting to the commission of the offense, and doing any one act which is either an ingredient of the crime or immediately connected with or leading to



its commission, is as much a principal as if he had with his own hand committed the whole offense.

You are instructed that to find any defendant guilty of the offenses charged in the seven counts of the indictment, it is not necessary to find that each defendant personally committed all of the acts charged. If you find beyond a reasonable doubt that any defendant aided, abetted, counseled, commanded, induced or procured the commission of the crime, then that defendant is just as guilty as if he individually perpetrated the crime himself, and in that event you must find him guilty as charged.

Intent is an ingredient of crime. It is psychologically impossible for you to enter into the minds of the defendants and determine the intent with which they operated. [628] You must, therefore, determine the motive, purpose and intent from the testimony which has been presented, and you will consider all of the circumstances disclosed by the testimony of the witnesses, bearing in mind that the law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the grounds of innocent intent.

Before any man can be convicted of a crime there must be established beyond a reasonable doubt that what he did was done purposefully, with intent to violate the law. No person can be convicted of a crime because he made a mistake in good faith.

Before you can find the defendants guilty in this case, the Government must have proven to you beyond a reasonable doubt that the defendants had

an intention to violate the statutes requiring the licensing of radio stations and operators.

The Court further instructs the jury that mere suspicions are not proof of guilt. One accused of crime must be found not guilty unless the fact of his guilt is proven beyond a reasonable doubt as defined in these instructions.

There are two kinds of evidence. Direct or positive, and circumstantial. Direct and positive testimony is that which a person observes or sees or which is susceptible of [629] demonstration by the senses, and circumstantial evidence is proof of such facts and circumstances concerning the conduct of the parties which conclude or lead to a certain inevitable conclusion. Circumstantial evidence is legal and competent as a means of proving guilt in a criminal case, but the circumstances must be consistent with each other, consistent with the guilt of the parties charged, inconsistent with their innocence and inconsistent with every other reasonable hypothesis except that of guilt, and when circumstantial evidence is of that character, it is alone sufficient to convict. You will review all the circumstances in the light of this instruction. [630]

\* \* \*

Counsel, have I overlooked anything?

If there are any exception to be noted, I shall, upon being advised of that, temporarily excuse the jury for that purpose as the rules provide. Are there any exceptions to be noted?

Mr. Dore: No exceptions by the Government.

Mr. Royce: I have one comment I would like to make in the absence of the jury, Your Honor.

The Court: The rules provide that these proceedings may be had in the absence of the jury.

(Jury admonished by the Court.)

The Court: You will now temporarily retire.

(Jury retires.)

The Court: The defendants may now note their exceptions.

Mr. Royce: If the Court please, my comment has to do with reference to the matter the Court struck from the overt acts of Count VII of the indictment. It is my understanding that the Government has now amended the indictment so that the indictment as it goes to the jury will not contain those stricken.

The Court: The Court should advise the jury again in this connection as to the withdrawal of those overt acts. My records show overt acts 1-5 inclusive stricken, also over acts 11, 12, 13 and 14 stricken, and no more.

Mr. Royce: That is correct.

The Court: The Court will withdraw those from the jury. Is there any objection?

Mr. Dore: No objection.

The Court: Is there anything else to be noted in the absence of the jury? [636]

Mr. Royce: No further exceptions, Your Honor.

The Court: Bring in the jury.

(Jury returns.)

The Court: All of the jurors have returned to

their places as before and all parties with their counsel are present.

The Court will advise the jury, and remind the jury if they have already been advised, that—this respects Count VII only, the conspiracy count—at the close of plaintiff's case in chief, the Court struck and the jury will totally disregard the following numbered overt acts mentioned in connection with Count VII: over acts 1-5 inclusive have been stricken, and the jury will disregard each and all of those five overt acts in Count VII. Likewise, overt acts 11, 12, 13 and 14 have been stricken out and the jury will disregard each and all of those overt acts.

All other overt acts alleged in that indictment, namely: 6-10 inclusive and 15-18 inclusive are now before the jury. Those last ones mentioned as being now before the jury are likewise contained in said Count VII.

I am going to repeat that. First, I will mention those overt acts which are stricken and withdrawn from the jury's consideration. As to Count VII, overt acts 1-5 inclusive are stricken and withdrawn from the jury's consideration. Likewise stricken and withdrawn are overt acts 11, 12, 13 [637] and 14 in Count VII. All other overt acts in that count are before the jury for the jury's proper consideration under the evidence in this case and the Court's instructions.

Are there any other things to be said or done before the Court submits the case to the jury?

Mr. Dore: None, Your Honor.

Mr. Royce: None for the defendants, Your Honor.

The Court: The clerk will now swear the bailiff. [638]

\* \* \*

### Certificate

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,  
Official Court Reporter.

[Endorsed]: Filed April 7, 1950.

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[Endorsed]: No. 12387. United States Court of Appeals for the Ninth Circuit. Ralph Casey, Edward Plesa and George LaClair, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed April 13, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



In the United States Court of Appeals  
For the Ninth Circuit

Criminal Action No. 12387

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RALPH CASEY, GEORGE LaCLAIR, and  
EDWARD PLESA,

Defendants.

STATEMENT OF POINTS ON WHICH  
APPELLANTS WILL RELY

The appellants will rely on the following points in this proceeding:

1. The District Court erred in denying appellants' motion to suppress evidence obtained by unlawful search and seizure and to return evidence seized thereby, and erred in refusing to exclude said evidence at the trial.

2. The District Court erred in denying appellants' motion to exclude evidence seized by unlawful search and seizure at the trial.

3. The District Court erred in denying appellants' motion to dismiss the indictment and each of the counts thereunder as to all three appellants.

4. The District Court erred in admitting the testimony of two witnesses as to messages intercepted by them upon failure of the Government to

connect same with the appellants and in denying appellants' motion to strike same by its failure to rule thereon.

5. The District Court erred in the admission of testimony as to signals and receptions obtained by unlawful interception thereof in violation of Section 605, Title 47, U. S. C., and by denying appellants' motions to exclude same.

6. The District Court erred in admitting testimony of a federal agent as to the violation of Section 301, Title 47, U. S. C., on Count II where such evidence was obtained by entrapment.

7. The District Court erred in its charge to the jury to the effect that each of the appellants could be found guilty of Counts I, II, III, IV, V and VI if they had aided and abetted the party transmitting energy or a signal in violation of Section 301, Title 47, U. S. C., although none of the counts of the indictment charge any of the appellants as principals before or after the fact and with aiding and abetting in the commission of this offense.

8. The District Court erred in its charge on Count II in failing to instruct on the issue of entrapment.

9. The District Court erred in its charge to the jury in that it did not define "wilfully" and "knowingly" and the meaning of a "purposeful and deliberate" failure to comply with the licensing provisions of Title 47, Sections 301 and 318, U. S. C.

10. The District Court erred in its charge to the jury on Count IV that the use and operation of a radio station without a license was a violation of Section 318, Title 47, U. S. C.; that the count on which the charge was based as set forth in the indictment was the broadcasting without an operator's license; that two separate and distinct offenses were incorporated in the Court's charge on Count IV and that said charge was not in accordance with the law and was prejudicially erroneous.

11. The District Court erred in its charge to the jury on Count V that the use and operation of a radio station without a license was a violation of Section 318, Title 47, U. S. C.; that the count on which the charge was based as set forth in the indictment was the broadcasting without an operator's license; that two separate and distinct offenses were incorporated in the Court's charge on Count V and that said charge was not in accordance with the law and was prejudicially erroneous.

12. The District Court erred in its charge to the jury on Count VI that the use and operation of a radio station without a license was a violation of Section 318, Title 47, U. S. C.; that the count on which the charge was based as set forth in the indictment was the broadcasting without an operator's license; that two separate and distinct offenses were incorporated in the Court's charge on Count VI and that said charge was not in accordance with the law and was prejudicially erroneous.

13. The District Court erred in its failure to set aside the verdict of the jury on Counts I, II, III, IV, V and VI of the indictment as being contrary to the weight of the evidence.

14. The District Court erred in entering judgment of conviction on all six counts as to all three appellants.

15. The District Court erred in its failure to grant appellants' motion for a new trial.

Filed: April 15, 1950.

/s/ F. M. REISCHLING,  
Attorney for Appellants, 634 Central Building,  
Seattle, Washington.

[Endorsed]: Filed April 17, 1950.

**In The United States Court of Appeals**  
**For the Ninth Circuit**

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RALPH CASEY, GEORGE LACLAIR and EDWARD  
PLESA, *Appellants,*

— vs. —

UNITED STATES OF AMERICA, *Appellee.*

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UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

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**BRIEF FOR THE APPELLANTS**

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**FILED**

**OCT - 2 1950**

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*Attorney for Appellants.* **CLERK**





**In The United States Court of Appeals**  
**For the Ninth Circuit**

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RALPH CASEY, GEORGE LACLAIR and EDWARD  
PLESA, *Appellants,*

— vs. —

UNITED STATES OF AMERICA, *Appellee.*

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UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

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**BRIEF FOR THE APPELLANTS**

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**In The United States Court of Appeals**  
**For the Ninth Circuit**

RALPH CASEY, GEORGE LACLAIR and EDWARD PLESA,	<i>Appellants,</i>	} No. 12387
vs.		
UNITED STATES OF AMERICA,	<i>Appellee.</i>	

UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

**BRIEF FOR THE APPELLANTS**

**JURISDICTION**

This action was commenced by the United States upon the return of a true bill by a Grand Jury indicting the appellants on seven counts charging violations of Sections 301 and 318, Title 47, United States Code, and Section 371, Title 18, United States Code, punishable under provision of Section 501, Title 47, U.S.C.A. Judgment was entered in the United States District Court for the Western District of Washington, Northern Division, on September 12, 1949, upon a verdict of guilty as to Counts I, II, III, IV, V and VI of the indictment. Notice of Appeal was given by the Appellants on September 19, 1949. A mandate dismissing the appeal was issued on February 10, 1950, by the United States Court of Appeals for the Ninth Circuit, but subsequently an order recalling said mandate and vacating the order dismissing the appeal, judgment of dismissal, and extending the time to file reporter's transcript was issued on March 14, 1950.

The jurisdiction of the district court was invoked under Title 28, Section 1355, United States Code (the New Federal Judicial Code). The jurisdiction of this court rests on Section 1294, Title 28, United States Code (the New Federal Judicial Code).

### QUESTIONS PRESENTED

1. Were the Constitutional rights of the appellants, as guaranteed them by the Fourth and Fifth Amendments to the Constitution of the United States of America and by Article I, Section 7, of the Constitution of the State of Washington, denied them by the admission in evidence of property seized by federal administrative officers, without a search warrant, said property being seized for the purpose of obtaining evidence upon which to base an arrest—objection to the use of the property seized having been timely made by motion to suppress the evidence and by a subsequent motion to exclude the evidence unlawfully seized?

2. Was the protection afforded by Congress by Section 605 of Title 47, United States Code (Section 605, Title 47, U.S.C., June 19, 1934, c. 653, Section 605, 48 Stat. 1103) forbidding persons not authorized by the sender from intercepting any radio communication denied the appellants by the trial court in admitting in evidence, over objection, testimony of witnesses of the substance of intercepted radio signals?

3. Does "plain error" exist in the court's charge to the jury on Counts IV, V and VI as would warrant a reversal of the conviction of appellants on these counts

because the court's charge was not in accord with the law and therefor prejudicial?

4. Did the court err in failing to set aside the verdicts of the jury on Counts I to VI, inclusive, of the indictments as to all three appellants on the ground that the appellee had failed to prove the material elements of the charges contained in the indictments, timely motion having been made to arrest judgment?

5. Are Sections 301 and 318, Title 47, U.S.C., insofar as they delegate authority to the Federal Communications Commission to exercise discretion in the determination to waive or modify the provisions of said section and to arbitrarily determine whom shall be prosecuted for violation thereof, unconstitutional as a delegation of legislative power?

### **SPECIFICATIONS OF ERROR**

The assignments of error may be summarized as follows:

1. The District Court erred in denying appellants' motion to suppress evidence obtained by unlawful search and seizure and to return evidence seized thereby, and erred in refusing to exclude said evidence at the trial.

2. The District Court erred in denying appellants' motion to exclude evidence seized by unlawful search and seizure at the trial.

3. The District Court erred in denying appellants' motion to dismiss the indictment and each of the counts thereunder as to all three appellants.

4. The District Court erred in admitting the testi-



mony of two witnesses as to messages intercepted by them upon failure of the Government to connect same with the appellants and in denying appellants' motion to strike same by its failure to rule thereon.

5. The District Court erred in the admission of testimony as to signals and receptions obtained by unlawful interception thereof in violation of Section 605, Title 47, U.S.C., and by denying appellants' motions to exclude same.

6. The District Court erred in its charge to the jury on Count IV that the use and operation of a radio station without a license was a violation of Section 318, Title 47, U.S.C.; that the count on which the charge was based as set forth in the indictment was the broadcasting without an operator's license; that two separate and distinct offenses were incorporated in the court's charge on Count IV and that said charge was not in accordance with the law and was prejudicially erroneous.

7. The District Court erred in its charge to the jury on Count V that the use and operation of a radio station without a license was a violation of Section 318, Title 47, U.S.C.; that the count on which the charge was based as set forth in the indictment was the broadcasting without an operator's license; that two separate and distinct offenses were incorporated in the court's charge on Count V and that said charge was not in accordance with the law and was prejudicially erroneous.

8. The District Court erred in its charge to the jury on Count VI that the use and operation of a radio

station without a license was a violation of Section 318, Title 47, U.S.C.; that the count on which the charge was based as set forth in the indictment was the broadcasting without an operator's license; that two separate and distinct offenses were incorporated in the court's charge on Count VI and that said charge was not in accordance with the law and was prejudicially erroneous.

9. The District Court erred in its failure to set aside the verdict of the jury on Counts I, II, III, IV, V and VI of the indictment as being contrary to the weight of the evidence.

10. The District Court erred in entering judgment of conviction on all six counts as to all three appellants.

11. The District Court erred in its failure to grant appellants' motion for a new trial.

### STATEMENT

This is a criminal action brought by the United States of America against the appellants based on the return of a true bill by a grand jury charging the appellants with violations of Title 301 and Title 318, U.S.C., punishable under Section 501, Title 47, U.S.C., and the violation of Section 371, Title 18, U.S.C.

As the result of a complaint made by the Police Department of the city of Everett, Washington, to the Federal Communications Commission in Seattle, Washington, to the effect that an unlicensed radio transmitter had been used by unknown individuals to bilk race track "bookies" out of a large sum of money, the officer in charge of the Federal Communi-

cations Commission in Seattle commenced an investigation for the purpose of locating said transmitter. The investigation was commenced on or about January 25, 1949 (R. 90-91, 207-208). No complaints other than this were received between that time and February 7, during which time the investigation had been proceeding by the F.C.C., excepting from two amateurs who heard an unidentifiable signal about 7:10 P.M. on February 7, 1949, in the State of Oregon (R. 40-41, 48-49). The first report indicated that the broadcast was being made on a frequency of 3936 kilocycles (R. 52). The signals heard on February 7 were on a frequency of approximately 3540 kilocycles. The Federal Communications Commission investigators were unable to locate any unauthorized signal on a frequency of 3936 kilocycles, but did hear a voice testing for modulation on a frequency of 3540 kilocycles (R. 53). Because they heard no call letters, they concluded that they were listening to an unlicensed station.

On February 10, 1949, at about 12:26 P.M., the investigators again heard a signal which they concluded was emanating from the Benjamin Franklin Hotel, located on the corner of Fifth and Virginia Streets in Seattle, Washington (R. 66-67). Three Federal Communications Commission investigators entered the hotel, and, using a direction finder, determined that the signal was coming from room 1217. The investigators did not know at this time to whom the room had been registered, nor had they seen the persons registered in that room. The investigator in charge heard a voice saying, "Testing 1-2-3-4 for

modulation." This was at 1:46 P.M. The Federal Communications Commission investigators returned to the lobby and checked the hotel records and discovered that the room was registered in the names of the appellants (R. 71). The investigator in charge then left the hotel and went to the United States Court House to secure a warrant for the arrest of the appellants. He left at about 1:52 P.M. Two other investigators remained in the lobby of the hotel for a few minutes, and then returned to their office. Upon arriving there, one of them received a telephone call (from the hotel manager), and he and his partner then went immediately to the Motor Ramp Garage, a garage not connected with the hotel but independently operated, located at 6th and Westlake, Seattle. They arrived at the garage at 2:15 P.M. The Motor Ramp Garage is approximately eight blocks from the Federal Court House and is approximately two blocks from the Benjamin Franklin Hotel. Both employees stayed in the garage for approximately ten minutes, one then left the garage for about the same time, and then returned and stayed there until approximately 3:15 or 3:20 P.M. (R. 140). When they first entered the garage, they talked to an attendant there, had the attendant point out the car of the appellants (a 1948 Packard convertible coupe) (R. 141-142), asked the attendant to unlock the car, which was done, and they then searched the automobile, returned the baggage to the car, and one of them then had a telephone conversation with the engineer in charge of the Federal Communications Commission, as the result of which he went out to obtain the services



of a policeman to prevent the appellants from moving the car in the event they attempted so to do until a warrant for their arrest could be served (R. 143). Immediately before these two men went to the garage, that is, somewhere between 1:52 P.M. and 2:15 P.M., they telephoned the attendant at the garage requesting him to disable the car so that it could not be moved prior to the arrest of the appellants, which was done (R. 224-228). A warrant for the arrest of the appellants was subsequently issued and was served by Marshal Scully upon the appellants in room 1217 of the Benjamin Franklin Hotel at 3:20 P.M. A search was made by the marshal of the room at the time of the arrest which disclosed nothing (R. 72-74). Following the arrest, the Federal Communications Commission investigators again returned to the Motor Ramp Garage and removed the articles theretofore discovered from the automobile, which articles consisted of radio transmitting equipment and a receiver.

Between 1:47 P.M., when the Federal Communications Commission investigator went to the courthouse to get a warrant for arrest, and 3:20 P.M., when the arrest was made, a search had been made of the appellants' automobile in a garage several blocks from the place where the arrest was made subsequently, said search being made without a warrant, although a magistrate was then available and no apparent necessity for a search without a warrant existed (R. 108, 155, 19-21).

Motion to suppress the evidence thus obtained was made prior to trial and was denied. Appellants were sentenced under Section 501 of Title 47, U.S.C.A.,



to serve terms of penal servitude, although that section requires that violations of Section 301 and 318, Title 47, U.S.C.A. must have been willful and knowing before the penalty attached, and the testimony of the appellants negatives any intention of wrongdoing or knowledge that the equipment seized by the Federal Communications Commission investigators was in operating order (R. 250-254, 256, 269, 275). The testimony of appellee is to the same effect—that the receiving apparatus was not tested and they were unable to say whether it would work or not (R. 108).

Count I of the indictment charged that the appellants on February 7, 1949, had unlawfully, willfully and knowingly used and operated certain apparatus for the transmission of energy, communications and signals by radio from the State of Washington to Portland, Oregon, without a station license.

Count II charged the appellants with having operated a radio station without a license on February 5, 1949, and with the transmission of energy from the State of Washington to a vessel sailing upon the navigable waters of the United States, to-wit: Puget Sound.

Count III charged the appellants with having, on February 10, 1949, unlawfully, willfully, and knowingly transmitted energy by radio, without having first obtained a station license, from one place within the State of Washington to other places within the State of Washington in such a fashion that the effects of the use and operation of the radio extended beyond the boundaries of the State of Washington and caused

interference with the transmission of energy, communications and signals from places in other states to places within the State of Washington, in violation of Section 301, Title 47, U.S.C.

Count IV charged the appellants with having on February 7, 1949, unlawfully, willfully and knowingly used and operated certain apparatus for the transmission of energy, communications and signals by radio from one place in the State of Washington, to Portland, Oregon, without having first obtained a radio operator's license, in violation of Section 318, Title 47, U.S.C.

Count V charged appellants with having, on February 5, 1949, unlawfully, willfully and knowingly operated a radio and having transmitted energy from Seattle to a vessel on the navigable waters of the United States, to-wit: Puget Sound, without having first obtained a radio operator's license, in violation of Section 318, Title 47, U.S.C.

Count VI charged the defendants with having, on February 10, 1949, in Seattle, Washington, unlawfully, willfully and knowingly used and operated a radio for the transmission of energy, communications and signals from one place in the State of Washington to other places in the State of Washington when the effects thereof would extend beyond the borders of the State of Washington and cause interference with the transmission of energy, without having first obtained a radio operator's license, in violation of Section 318, Title 47, U.S.C.

Count VII charged the appellants with conspiracy to willfully, unlawfully and knowingly operate apparatus for the transmission of energy, communications and signals by radio without a station license having first been obtained from the Federal Communications Commission, and alleged a series of overt acts indicating the transmission of energy within the State of Washington when same would cause interference with the transmission of energy, the transmission of signals to Portland, Oregon, and to a vessel on the navigable waters of the United States, all in violation of Section 318, Title 47, U.S.C., and Sec. 371, Title 78, U.S.C.

The appellants were tried by a jury and were found guilty of all counts except Count VII, the count charging conspiracy. Motion for a new trial was filed on September 10, 1949. Judgment, sentence and commitment was entered by the District Court on September 12, 1949. Notice of Appeal was given by the appellants on September 19, 1949, and an order dismissing the appeal was entered on the 9th day of January, 1950, for the reason that appellants had purportedly failed to remit the estimated cost of printing the record. On February 10, 1950, the court issued a mandate \* \* \* and subsequently, on March 14, 1950, this court entered an order recalling its mandate, vacating the order dismissing the appeal and judgment of dismissal, and extending the time to file the reporter's transcript, thereby reinstating the appeal.

## ARGUMENT

## I.

**The Search and Seizure Without a Search Warrant, Conducted by Federal Administrative Officers, of Appellants' Automobile, for Evidence to Be Used in Support of a Warrant for Arrest and Subsequent Indictment Was Unlawful and Unreasonable.**

The appellants contend that their motion to suppress evidence obtained as a result of an unlawful search and seizure should have been granted and the admission in evidence of radio equipment seized by administrative officials was prejudicial to their rights guaranteed by the Fourth and Fifth Amendments to the United States Constitution, the search and seizure having been made without a warrant, not incidental to a lawful arrest, purely for the purpose of securing evidence with which to support an indictment, and for identification purposes only.

Appellants further contend that should the search and seizure be construed to have been incidental to a lawful arrest, said search and seizure was unreasonable and violative of the Fourth and Fifth Amendments to the Constitution in that there was "no compelling reason" to justify the absence of a search warrant, "no inherent necessity" or situation making a search without a warrant reasonable; that the area searched was beyond the "immediate possession and control" of the appellants and not within any permissible area of search incidental to a lawful arrest.

The Fourth Amendment provides:

"The right of the people to be secure in their



*persons*, houses, papers, and *effects*\* against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article I, Section 7, Washington State Constitution, provides:

"Invasion of Private Affairs or Home Prohibited.—No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

The Fifth Amendment provides:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury \* \* \* nor shall be compelled in any criminal case to be a witness against himself \* \* \*."

Section 781 of Title 49, U.S.C., defines contraband articles and provides for the seizure and forfeiture of carriers transporting contraband articles \* \* \*:

"(b) As used in this section the term 'contraband article' means — (1) any narcotic drug which has been or is possessed with intent to sell or offer for sale — (2) any firearm, with respect to which there has been committed any violation of any provision of the National Firearms Acts—(3) any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or any foreign country \* \* \*."

The power to make an arrest is specifically set forth in Title 18, Section 3041, U.S.C.A. and confers the

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\*Emphasis supplied.



authority to make an arrest for any offense against the United States upon any justice or judge of the United States, or by any United States Commissioner, chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, *justice of the peace, or other magistrate\** of any state where the offender may be found. Section 3052, Title 18, U.S.C.A., confers the power to make an arrest without a warrant, upon reasonable grounds on which to believe that a felony has been committed upon members of the Federal Bureau of Investigation; Section 3053 confers this power of arrest upon U.S. marshals and deputies.

It is elementary that only unreasonable searches are prohibited by the Fourth Amendment. *Carroll v. United States*, 267 U.S. 132. If legally obtained, the radio equipment seized was competent evidence in establishing the corpus delicti and identifying the appellants as parties sought in an investigation of unauthorized radio transmissions.

A search without a warrant may be made as incident to an arrest, but such search is dependent initially on a valid arrest. The dicta of the Supreme Court of the United States in the case of *Rabinowitz v. United States*, 255 U.S. 298, cannot be reasonably expanded to the point where it can be used as authority for any interpretation that a search made prior to an arrest disclosing evidence with which to support the warrant of arrest, and ultimately an indictment and conviction of operating a radio station without

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\*Emphasis supplied.

a license, is reasonable, because the articles seized in that search were contraband as defined by Section 781 of Title 49, U.S.C., and as such were subject to seizure without a warrant.

Searches of automobiles have generally involved enforcement of the National Prohibition Act or for contraband articles expressly declared to be subject to seizure and forfeiture by express act of Congress. See *Harris v. United States*, 331 U.S. 145, Section 780, *et seq.*, Title 49, U.S.C. (Liquor).

The contention that an automobile is more vulnerable to a search without a warrant, than other property, has its source in the decision of the Supreme Court in *Carroll v. United States*, *supra*. It must at all times be remembered that the search permitted by the *Carroll* case was made and its validity upheld under the search and seizure provisions specifically enacted for the enforcement of the National Prohibition Act *and of that Act alone*.\* Transportation of liquor in violation of that act subjected, first, the liquor, and then the vehicle in which it was found, to seizure and confiscation, and the person "in charge thereof" to arrest. Section 26, Title 2, of the National Prohibition Act, provides in part as follows:

"When \* \* \* any officer of the law shall discover any person in the act of transporting in violation of the law intoxicating liquor in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating

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\*Emphasis supplied.

liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team, or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof." Section 40, Title 27, U.S.C.A.

In the *Carroll* case, the court reviewed the legislative history of enforcement legislation and concluded:

"The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles *in the enforcement of the Prohibition Act* is thus clearly established by the legislative history of the Stanley Act. Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches and seizures, but only such as are unreasonable."

The progeny of the *Carroll* case likewise dealt with searches and seizures under this Act. *Husty v. United States*, 282 U.S. 694, 74 A.L.R. 1407 (Liquor).

Relying on the decision of *Carroll v. United States*, *supra*, the District Court refused to grant the motion of the appellants to suppress the evidence obtained from a search, by federal administrative agents, of the trunk of appellants' automobile. Appellants respectfully submit that neither the *Carroll* case nor the horde of cases since decided in reliance thereon, go so far as to permit the search of any automobile, without a search warrant, that may be suspected of being connected with a crime, even on reasonable cause to believe that the automobile contains evidence that

may be connected with the perpetration of a crime, except where there is reasonable ground to believe that the vehicle is being used to carry "contraband" as defined in the statutes.

The rule in the *Carroll* case was predicated on specific legislation and was not intended to be extended beyond the facts of that case. As the Supreme Court said in *United States v. DeRi*, 332 U.S. 581, 584, 585, "Obviously, the court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefor unconstitutional. In view of the strong presumption of Constitutionality due to an act of Congress, especially when it turns on what is 'reasonable,' the *Carroll* decision falls short of establishing a doctrine that, *without such legislation*,\* automobiles nonetheless are subject to search without a warrant in enforcement of all Federal Statutes. *This court has never yet said so.*"\*

It is well to observe the caution of the Supreme Court in the *DeRi* case:

"We need not decide whether, without such Congressional authorization as was found controlling in the *Carroll* case, any automobile is subject to search without warrant *on reasonable cause to believe it carries contraband.*"\* *United States v. ReRi, supra.*

It should again be noted that in those cases discussing the permissibility of searching an automobile without a warrant, the object to be sought was liquor de-

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\*Emphasis supplied.



clared by Congress to be subject to seizure and forfeiture whenever found.

It would indeed be stretching the rule laid down in the *Carroll* case to an illogical conclusion to say that the express authorization of Congress declaring liquor to be contraband, and therefore subject to search and seizure, constituted justifiable grounds for permitting the search and seizure by law enforcement officers or by administrative agents of the Federal Government to search any vehicle believed to contain anything that would be of evidentiary value in carrying out that agency's delegation of authority. The basic framework for a police state would be complete if such a rule were adopted.

"When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *United States v. Asendio*, 171 F.2d 122.

"A search and seizure cannot be reasonable, and therefore justified, if it is based solely on the purpose of obtaining nothing but information generally, which may, perhaps, be proof that a crime had been committed. Evidence so obtained is not admissible against the person or persons whose rights have been violated. To admit it would be contrary to the Fifth Amendment in that part which reads 'No person \* \* \* shall be compelled in any criminal case to be a witness against himself'." *Boyd v. United States*, 116 U.S. 616; *Gouled v. United States*, 225 U.S. 298.

Had the officers in this case desired to obtain a warrant for the search of the automobile, it would have been necessary for them to produce evidence



tending to show that the baggage contained articles used in the commission of the offense, or were of a contraband nature; otherwise, the attempt to secure the warrant would have been upon mere information and belief, which the courts have held to be insufficient as a basis for the granting of a search warrant. *United States v. Blich*, 45 F.(2d) 622.

The search here cannot be justified by what was found. The courts have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law, it is good or bad when it starts and does not change character from its success. *United States v. DeRi, supra*.

Federal law enforcement officers, and more particularly Federal administrative officers, should not be permitted free rein to search and seize at will. They should not be permitted to do without a warrant what they could not do with a warrant. As was said in *Gouled v. United States, supra*, warrants may not be used as a means of gaining access to a man's office and house and papers solely for the purpose of making search to secure evidence to be used against him in a criminal and penal proceeding, but may be resorted to only where a primary right to search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of property by the accused unlawful and provides that it may be taken.

The rights guaranteed by the Fourth and Fifth Amendments have been declared to be indisputable to

the full enjoyment of personal security, liberty, and private property:

“It has been repeatedly decided that these Amendments should be liberally construed so as to prevent ‘the stealthy encroachment upon, or the gradual depreciation of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous officers’.” *Gouled v. U. S.*, *supra*, p. 304

The protection of the Fourth and Fifth Amendments reaches all alike, whether accused of a crime or not, *and including those suspected or known to be offenders*, and the duty of giving it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws. *Go-Bart Importing Company v. United States*, 282 U.S. 344.

When it becomes apparent during the trial that there has been an unconstitutional seizure of the property of the accused, the court should exclude the property and any testimony relating thereto given by the government agents who made the unlawful seizure on motion of the accused made after both testimony and property have been introduced in evidence against him. *Amos v. United States*, 255 U.S. 313; *Agnello v. United States*, 269 U.S. 20; *State v. Miles*, 29 Wn. (2d) 921, 190 P.(2d) 740. In the present case, it was error to refuse appellants’ motion to strike the testimony pertaining to the equipment unlawfully seized from appellants’ automobile.

In the present case, if you remove from the record the evidence of what the officers found upon their search of the automobile, there is little left but suspi-

cion that a crime had been committed. The agents of the Federal Communications Commission "thought" that the people in Room 1217 were those people whose signals they had heard transmitted from time to time. They had no basis on which to search without a warrant. This case is readily distinguishable from those cases permitting officers to seize liquor, stamps, narcotics, or other contraband, the possession of which is, standing alone, illegal. By no stretch of the imagination could it be said that the presence of radio equipment of any kind, unless stolen, in an automobile away from the place of arrest was evidence of criminality.

Nor can the search be justified as an incident to a lawful arrest. A search is never permitted where it is general or exploratory for whatever might be turned up.

"The authority of officers to search a person's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest is certainly not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and and things sought to be obtained. The informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." *United States v. Kirschenblatt*, 16 F. (2d)

202, 51 A.L.R. 416; *Go-Bart Importing Company v. United States*, *supra*.

It has been said that "what is a reasonable search is not to be determined by any fixed formula." *United States v. Rabinowitz*, *supra*. If the search was made as an incident to arrest, it then becomes necessary to determine whether such search was, under the circumstances, reasonable. The appellants contend that, assuming the search was made as an incident to their arrest, such search and seizure was unreasonable and unwarranted by any interpretation, even the most liberal, of the rules hertofore expressed by the Federal Courts.

There is no dispute that objects that have been utilized in perpetrating a crime for which an arrest is made are properly subject to seizure. There is, however, a limitation on the permissible area of search for evidence of a crime. Though this area appears to gradually be expanding as time increases and the period of the Revolution of 1776 diminishes in the parade of history, it should not be expanded so as to include the whole world.

The right to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it is committed seems to have stemmed not only from the acknowledged authority to search the person, but also from the long standing practice of searching for other proofs of guilt found upon arrest. *Weeks v. United States*, 332 U.S. 383, 392; *U. S. v. Rabinowitz*, *supra*. It has become the accepted rule that the premises where the arrest is made, *which premises are under the*



*control of the person arrested*, and where the crime is being committed, are subject to a search without a search warrant. Such searches have been held not to be "unreasonable." The court in the *Rabinowitz* case laid down a standard of an extremely flexible character and states:

"The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criteria, in turn, depends upon the facts and circumstances—the total atmosphere of the case." *United States v. Rabinowitz, supra*.

Certainly the most liberal construction of the court in the *Rabinowitz* case, wherein the search was limited to defendant's place of business, a one room office open to the public, should not be extended beyond the facts of that particular case and distorted to the extent that would be necessary to give rise to a rule of law that would condone the search of an automobile located in a garage—some distance away from the place of arrest—where the automobile is not believed to be carrying "contraband" and where the automobile is not in "the immediate possession and control" of the parties arrested.

The illegality of the first search cannot be absolved by the later search purportedly made as an incident to the arrest where made prior to the time a warrant of arrest was obtained and again after appellants had been taken to the Federal Court House for arraignment, particularly where such search was conducted by federal administrative officers in the absence of any United States Marshal or officer authorized by law to serve a warrant, and without a search warrant.



It is evident that in the instant case, the search was made solely for the purpose of seizing whatever might be turned up on examination of the baggage in the hope that it might be of evidentiary value in connecting the appellants with a federal crime under investigation.

“But to assume that this exception of a search incidental to arrest permits a freehanded search without warrant is to subvert the purpose of the Fourth Amendment by making the exception displace the principle.” Justices Frankfurter and Jackson, dissenting in *United States v. Rabowitz*, *supra*.

## II.

**That the Mandate of Congress in Section 605 of Title 47, U. S. Code, Prohibiting the Divulgence of the Contents of Intercepted Communications by a Person Unauthorized so to do by the Sender Thereof Was Ignored by the Trial Court in Admitting Testimony of Witnesses as to the Substance of Radio Messages Intercepted by Them Without the Consent or Approval of the Senders.**

The appellants contend that the refusal of the trial court to strike the testimony of witnesses as to the context of radio messages intercepted by them violated the prohibition of Section 605, Title 47, U.S.C., and constituted reversible error.

The pertinent portions of the code applicable to the issue are as follows:

“\* \* \* and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such inter-

cepted communication to any person; \* \* \* provided that this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication, broadcast, or transmission by amateurs or others *for the use of the general public*, or relating to ships in distress." (Section 605, Title 47, U.S.C., June 19, 1934, c. 652, Section 605, 48 Stat. 1103)

Whether the mandate of Congress which prohibits the divulgence of signal communications as expressed by the United States Supreme Court in the case of *Nardone v. U.S.*, 302 U.S. 378 (1st case), 308 U.S. 338 (2nd case), is likewise applicable to the transmission of energy, signals and messages by radio, appears to be one of first impression.

The appellants urge that the strict prohibition of Section 605, Title 47, U.S.C., is applicable to bar the admission in evidence of testimony presented by witnesses, of the contents of messages transmitted by radio where such transmissions are either intra or interstate transmissions and not intended for the use of the general public—consent to the divulgence of the contents of the messages not having first been obtained.

Intrastate as well as interstate communications are within the interdiction of the Federal Communications Commission Act, 47 U.S.C.A. 605; *Weiss v. U.S.*, 308 U.S. 321, 327. The prohibition against the divulgence of the contents of telephone, telegraphic or radio communication rests not on any Constitutional basis but rather on act of Congress. *Beard v. Sanford*, 110 F.(2d) 527 (1949).

A message is "intercepted" within the prohibition

of the Communications Act when anyone intercepts a message to whose intervention the communicants do not consent, irrespective of the means employed to accomplish the interception. Consent of both sender and receiver is necessary before the contents of the message can be divulged. *U.S. v. Polakoff*, 112 F.(2d) 888 (1940).

The case of *Nardone v. U.S.*, 302 U.S. 378, 82 L. ed. 515, 84 L. ed. 307, prohibited the introduction at trial of evidence obtained by wire tapping. A long line of cases have since reiterated the rule of the interdiction of Congress.

Appellants submit that by analogy the contents of radio messages not intended for the use of the general public is protected by Section 605, Title 47, U.S.C., from being divulged without the authority of the sender. The divulgence of this information falls within the prohibition of the *Nardone* case. The testimony of witnesses as to the contents of the messages should have been excluded.

*Sablowski v. United States*, 101 F.(2d) 183.

See also:

*United States v. Gruber*, 39 F. Supp. 292 (1941).

## III.

**That the District Court Committed Plain Error in Its Charge to the Jury on Counts IV, V, and VI, Which Counts Were Based Upon Section 318 of Title 47, U.S.C., and Which Error Was Extremely Prejudicial to the Appellants.**

The pertinent language of the statute involved reads as follows:

“The actual operation of all transmitting apparatus in any radio station for which a station license is required by this chapter shall be carried on only by a person holding an operator’s license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator’s license issued to him by the Commission; \* \* \*.”

To this section there is a provision permitting the Commission to waive or modify the foregoing provisions excepting as to (1) stations for which licensed operators are required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers, and a further provision giving to the Commission the power to make special regulations governing the granting of licenses for the use of automatic radio devices or for their operation. Section 318 must be considered in the light of the purpose of this legislation, which is disclosed by Section 301 of Title 47 and which is, among other things, to “maintain the control of the United States over all the channels of interstate and foreign radio transmission” and which provides that said regulation prohibits the operation



of apparatus for the transmission of energy, communications, or signals by radio.

What is a radio station? The answer apparently is found in Section 318 which limits the power of the Federal Communications Commission to waive or modify the provisions of that law with regard to the stations for which operators are required by international agreement, where operators are required for safety purposes, stations engaged in broadcasting, and stations operated as common carriers. An amateur station, a "walkie-talkie," radio activated appliances, garage doors, etc., would obviously not be included. Neither of these sections, therefore, would ban or bar the particular operation with which these appellants are charged. Only by the exercise of the discretion given by the Act to the Federal Communications Commission officers can the acts and conduct charged to these appellants subject them to prosecution for the commission of a crime.

The court in its instructions on Counts IV, V, and VI, which were based on Section 318, told the jury that if they found that a signal had been transmitted on February 5, 7, and 10th, by the appellants, and if the appellants had no radio operator's license, and if the appellants did "unlawfully, willfully and knowingly" use and operate a radio station, then they would be guilty of the count as charged. Section 318 had only to do with the transmission of a radio signal without an operator's license. It had nothing whatever to do with the operation of a radio station. A radio station was not defined to the jury, nor were they told that as a matter of law, the operation of the "walkie-



talkie" which the appellants were charged with operating, constituted a violation of Section 318. The jury was left completely in the dark to speculate as to what was a radio station, and were left further completely in the dark as to what constituted a willful and knowing violation of the section. It will be noticed that the only instruction as to intent followed the charge on Count VII, as to which count the jury found the appellants not guilty. After instructing on Count VI, the court instructed on Count VII, mentioning that count particularly by number seven times.

The court, therefore, included in its charge on these three counts the violation of Counts I, II and III which was the operation of a radio station without a license in violation of Section 301, and made the violation of Section 301 a material allegation of Counts IV, V and VI so that the jury, having determined that the appellants were guilty of Counts I, II and III had practically convicted them of Counts IV, V and VI before they ever came to a consideration of the appellants' guilt as to these particular counts. In other words, the findings on Counts I, II and III practically forced the jury to convict on Counts IV, V and VI. It should be noted in connection with these counts, also, that the jury was instructed that the transmission of the radio signal as charged to the appellants caused interference with the transmission of energy, communications and signals. The only testimony in the case as to any interference was that of witnesses Hart and McPherson, who testified they heard an unidentifiable signal on February 7 between 7:10 and 7:30 P.M., and before their net time of 7:30 ap-

proached. There was no evidence in the case of any interference on any date other than on February 7 and that signal was heard prior to the time that the amateur group had commenced their communications (R. 40, 47 and 49).

We submit, therefore, that elements were injected into the charges on Counts IV, V and VI which were not supported by the testimony and which were not in accord with the law.

Appellants concede that the patent error contained in the court's charge as to these counts was not brought to the attention of the court by exception. Under the rules of criminal procedure for the District Courts of the United States adopted by the Supreme Court of the United States, Rule 52, provides as follows: "*Harmless Error and Plain Error*. (b) Plain errors or defects affecting substantial rights may be noticed, although they were not brought to the attention of the court." We submit that these instructions and the instructions as a whole as to the charge as to each of the six counts were erroneous and that, inasmuch as the substantial rights of the appellants are involved, this court may take notice of said errors.

*U.S. v. Atkinson*, 297 U.S. 157;

*Dowell, Inc. v. Jowers*, 166 F.(2d) 214, 2  
A.L.R.(2d) 442, cert. den. 334 U.S. 832

(holding that when it is apparent from the face of a record that a miscarriage of justice may have occurred because of failure of counsel to make timely objection to errors, the reviewing court will, upon its own motion, consider such errors).

Appellate courts may, at their own instance, notice error to which no exception has been taken if the errors are obvious or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings. *U.S. v. Socony Vacuum Oil Co.*, 310 U.S. 150.

#### IV.

**That the Court Erred in Failing to Set Aside the Verdict on Counts I, II, III, IV, V, and VI of the Indictment, the Evidence Adduced Being Insufficient to Warrant a Conviction on any of Said Counts.**

Sections 301 and 318 of Title 47, U.S.C., may be described as regulatory or administrative law as distinguished from penal law or laws providing for penalties for violation thereof. It will be noted from an examination of these laws that there is placed within the power of the Federal Communications Commission the power to regulate or enjoin or prevent the unauthorized transmission and reception of radio communications. No penalty is contained in either Section 301 or Section 318 for violation, and as testified to by Herbert Arlowe, the chief engineer of the Federal Communications Commission in Seattle, in the twenty-one years that he has been connected with the Federal Communications Commission, he has prosecuted but two cases involving violation of these particular sections (R. 88-89, 281-285). One of the cases prosecuted was in San Francisco and one in Seattle. The ordinary course of conduct by an investigator for the Federal Communications Commission is to endeavor to obtain proof of the operation of an unlicensed transmitter be-

fore taking any action. Mr. Arlowe testified as follows:

"A. We determine what kind of operation they are doing, first, whether they have ever had a license, what type of operation they are carrying on. If it looks like they are making a broadcast with an unlicensed transmitter and that they are old enough to realize what they are doing, and if they are using the radio for more than just to test or in preparation for getting a license.

Q. Then you go and talk to them, don't you, and find out what they are doing?

A. No, we don't. We judge from what they say on the air, what they do with it.

Q. In other words, if any broadcast is just within the State of Washington and doesn't go out into the navigable waters of the United States or across state lines, it isn't a violation of your regulations or laws, is that right?

A. Not exactly right, no.

Q. Will you tell the court and jury — —

A. The communications rules provide that these low power devices, where the maximum signal is one-sixth of one wave length and at that distance is 15 microvolts per meter, not more, may be used to remotely control radio controlled objects such as garage door operators or other devices that can be operated with a relay. Now, after that rule was adopted, then the manufacturers of phonograph records, phonograph record players, received permission and received type approval numbers for equipment to be used without any antenna, and measurements were made to indicate that on those that received type approval, that the signal did not radiate



from that particular receiver, or phonograph oscillator, I should say, more than 15 microvolts per minute, 1 over 2 pi times waves length, roughly, one-sixth wave length." (R. 283-284)

We shall lift out of the context of Mr. Arlowe's testimony the following significant phrase. "*\* \* \* and if they are using the radio for more than just to test or in preparation for getting a license.*" In this case, there is no testimony of any nature which would indicate that this small, portable "walkie-talkie," which was purchased by the appellant LaClair for \$50.00, and which they intended to use at the golf club which they purchased and which was incidentally, purchased after their arrest, was intended to be used for anything other than in conjunction with this golf club and shooting range which they intended to operate with their golf course (R. 251-253, 279-280). The testimony of the Government's witness to the effect that they did not interfere with such devices excepting when they were actually in operating condition makes their conduct in this instance subject to the closest scrutiny.

Underlying the arrest of these appellants is the significant fact that the Everett Police Department had enlisted the aid of the Federal Communications Commission in trying to locate a radio transmitter which had been used by certain persons to obtain money from bookmakers in Everett, Washington (R. 206-208). Co-incidentally, the appellants at that particular time were testing a piece of equipment which they intended to use on a golf course. The Federal Communications agents zealously attempted to help



the Everett Police Department in running down the men who had taken the Everett bookmakers. Bookmaking in the State of Washington is illegal. Bookmakers can be prosecuted under state law for their illegal activities. It is very strange, therefore, that rather than attempting to locate and prosecute the individuals who were guilty of bookmaking under the laws of the State of Washington, that the Police Department of that city should enlist the aid of a federal agency to track down the persons suspected of taking the bookmakers. They determined to find an unlicensed transmitter. They found one. There is no contention, nor has there been throughout this entire record, that these appellants were the ones who had operated radio equipment in Everett, and, as has been pointed out before, there is no testimony to indicate that the receiver of the equipment unlawfully taken from the appellants' car was in operating condition. There was no evidence to go to the jury that they had willfully and knowingly violated Sections 301 and 318 of Title 47, U.S.C.A. The penal provision had to be inflicted under Section 501 of Title 47, U.S.C.A., which provides:

“Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omissions or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty

(other than a forfeiture) is provided herein, by a fine of not more then \$10,000 or by imprisonment for a term of not more than two years, or both."

It is also significant that there has been but one prosecution in this district in the last twenty-one years for a violation of this law. The appellants did not know even when they were arrested that they had committed any offense. There being no evidence that the equipment would operate, there being no evidence that any signal was given other than conceivably would be given in an effort to test the equipment, there being no testimony in the record, with the one exception of the signal heard in Oregon on February 7, (other than that of the Federal Communications Commission investigators as to the signals intercepted by them which even they could not testify were heard or received by the receiver) and all of the testimony indicating that at the time the signals were transmitted, the person attempting to receive the same was in direct view of the person broadcasting the signal and who was attempting to get a response from the person intended to receive the same so as to indicate whether or not the equipment worked, there was nothing to go to the jury on the question of the operation of a radio station knowingly and willfully without a license. A man cannot bbe guilty of operating that which is not capable of operation, and the record is silent that this equipment was in working order, although the testimony of the appellants themselves is to the effect that they heard no signals.

## V.

**That Sections 301 and 318 of Title 47, U.S.C.A., Insofar as They Delegate Authority to the Federal Communications Commission to Exercise Discretion in the Determination to Waive or Modify the Provisions of Said Section and to Arbitrarily Determine Whom Shall Be Prosecuted for Violation Thereof, Is Unconstitutional.**

The Constitutionality of any statute creating a criminal offense may be challenged for the first time on appeal where the matter involves the deprivation of life or liberty. *State v. Diamond*, 27 New Mexico 477, 202 Pac. 988, 20 A.L.R. 1527. *Re: Clarke*, 105 Mont. 401, 74 P.(2d) 401.

As we have earlier pointed out in this brief, the Federal Communications Commission was authorized by Congress to waive or modify the provisions of Section 318 excepting for the four classifications involving stations requiring licensed operators (1) by international agreement, (2) for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers. The particular offense charged in the indictment in this case involved none of these four classifications and as was testified to, it is the practice and custom of the local Federal Communications Commission office to determine the "kind of operation, if they have ever had a license, what type of operation they are carrying on" (R. 283). The investigator then testified that if, in their opinion, the operator knows what he is doing, and if they are using the equipment for more than just to test or in preparation for applying for a license, then,

according to their interpretation, they can be charged, but the standards by which this determination is made have not been fixed by Congress. The offense charged in the particular indictment before this court is an offense only because the Federal Communications Commission officials in Seattle exercised the discretion to declare it to be one.

How do they determine whether the users of the equipment are doing more than "just testing"? How do they determine that they are using the equipment merely in preparation for getting a license? The tests made by the appellants in the case were made between a period of February 2 to 10 and were unsuccessful according to appellants' testimony. The arrest was made on the 10th. The general rule is well stated in 11 Am. Jur. 947, Sec. 234, as follows:

"Sec. 234. Reasonable Exercise of Discretion and Arbitrary Power Distinguished.—In all cases where a law provides for the exercise of discretion by administrative officers, in order to be valid and escape the taint of unconstitutional exercise of legislative or judicial authority, the discretion must be lawfully exercised in accordance with established principles of justice. It cannot be a mere arbitrary choice, for it has been said that in the American system of government no room is left for the play and action of purely arbitrary power. A distinction is consequently drawn between a delegation of the power to make the law which necessarily includes a discretion as to what it shall be and the conferring of authority or discretion as to its execution. The first cannot be done, but the second under certain circumstances is permissible.



“The practical question which arises in this problem is the determination of what is a proper and reasonable discretion and what is an invalid arbitrary discretion. The generally accepted rule as to this question is to the effect that a statute or ordinance vests an arbitrary discretion in administrative officers with respect to an ordinarily lawful business, profession, or appliance, if it fails to prescribe a uniform rule of action or fails to lay down a guide or standard whereby the exercise of discretion may be measured. Any law which authorizes the issuing or withholding of licenses, permits, or approvals or sanctions other administrative functions in such a manner as the designated officials arbitrarily choose, without reference to all of the class to which the law under consideration was intended to apply and without being controlled or guided by any definite rule or specified conditions to which all similarly situated may conform, is unconstitutional and void.”

It is inconceivable that a conviction based upon the whim and caprice of the investigating agent would be permitted to stand. We submit, therefore, that, insofar as this statute permits the Federal Communications Commission to exercise arbitrary discretion in determining what shall or shall not be classified as a crime, that to that extent this statute is unconstitutional as an unlawful delegation of legislative power.



## CONCLUSION

In conclusion we submit that the search and seizure of the equipment taken from appellants' automobile was illegal and wrongful, and that the evidence so obtained should have been suppressed and that all testimony relating thereto should have been excluded. We further submit that the search and seizure was not justifiable as an incident to the arrest, it having been made more than one hour prior to the issuance of a warrant, and further, having been made by an investigator not authorized by law to make an arrest or to serve process. We further submit that at the time of the search and seizure, there was no probable cause existing for the arrest of the defendants; that the evidence was insufficient to sustain the verdict, and that the defendants have been denied their Constitutional rights as provided by the Fourth and Fifth Amendments to the Constitution of the United States and by Article I, Section 7, of the Constitution of the State of Washington. We further submit that the statute upon which these men were indicted and charged is unconstitutional insofar as it purports to delegate to the Federal Communications Commission the power to determine what shall or shall not constitute a crime.

Respectfully submitted,

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October, 1950.



**APPENDIX**

Section 501, Title 47, U.S.C.A.:

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than \$10,000 or by imprisonment for a term of not more than two years, or both.

Sectin 318, Title 47, U.S.C.A.:

The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Chapter shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: Provided, however, That the Commission, if it shall find that the public interest, convenience, or necessity will be served thereby may waive or modify the foregoing provisions of this section for the operation of any station except (1) stations for which licensed operators are required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers on frequencies below thirty thousand kilocycles: Provided further, That the Commission shall have power to make special regulations governing the granting of licenses for the use of automatic radio devices and for the operation of such devices.

Section 301, Title 47, U.S.C.A.—License for radio communication or transmission of energy:

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission \* \* \*. *No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio* (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the U.S., or (c) *from any place in any State, Territory, or possession of the United States to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.*

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\*Emphasis supplied.

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*Appellants,*

vs.

UNITED STATES OF AMERICA,  
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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION

---

HONORABLE JOHN C. BOWEN, *Judge*

---

**BRIEF OF APPELLEE**

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**BRIEF OF APPELLEE**

---

**JURISDICTION**

Jurisdiction for this court to review this case is set out on Page 1 of Appellants' Brief.

**STATEMENT OF THE CASE**

On February 5, 1949, representatives from the Seattle Office of the Federal Communications Com-

mission were aboard a Coast Guard Cutter outside the boundaries of the State of Washington in Puget Sound and intercepted a radio message sent by the Appellants from 1:00 to 3:00 in the afternoon. This was a voice broadcast. The person broadcasting would ask occasionally of Eddie and Ralph whether the signal could be heard. These were voice signals made on the code band at approximately 3540 kilocycles.

Two amateur operators from the State of Oregon intercepted an unidentifiable signal on February 7, 1949, at about the hour of 7:10 P. M. on a frequency of approximately 3540 kilocycles, which was a voice communication on that portion of the band which is reserved for code operation.

For several days thereafter, the agents of the Federal Communications Commission heard the phantom voice at a frequency of 3540 kilocycles and attempted to locate it by direction-finding equipment. Every time the station was about to be located in a hotel, the voice would go off the air. The next day the direction-finding equipment would indicate the station was in some other hotel. (Tr. 58, 126, 158).

On or about February 10, 1949, the phantom voice transmissions on the same frequency were again heard beginning at about 12:26 P. M., which signals were determined as emitting from the Benjamin

Franklin Hotel which is located on the corner of 5th and Virginia Street in Seattle, Washington. Representatives from the Federal Communications Commission, Seattle, Washington, using direction finders, determined that the signal was coming from the Benjamin Franklin Hotel and later determined that the signal was coming from Room 1217. The Investigator in Charge heard a voice inside said room broadcasting the same identical language which he heard simultaneously over the portable radio set which another agent was carrying. This signal was intercepted at 1:46 P. M., whereupon the investigators verified the registered occupants of said hotel room and discovered that they were RALPH CASEY, GEORGE LeCLAIR and EDWARD PLESA, the appellants in this case. The Investigator in Charge then proceeded to the United States Court House, and after a delay in endeavoring to locate the United States Commissioner and the United States Marshal, returned with a Deputy U. S. Marshal armed with a warrant for the arrest of the three appellants at or about the hour of 3:20 P. M., at which time the three appellants were arrested in Room 1217 of the Benjamin Franklin Hotel, Seattle, Washington.

Meantime, shortly after 2:00 P. M. on February 10, 1949, one of the investigators of the Federal

Communications Commission was called by Mr. Standard, the Assistant Manager of the Benjamin Franklin Hotel, who informed the investigator that these three parties were about to check out and that the appellants had moved two pieces of luggage from their room to the Motor Ramp Garage which is located directly behind the hotel and is separated from the hotel only by an alley. Two of the investigators arrived at the Motor Ramp Garage between 2:30 to 2:45 P. M. and one of the investigators remained at the garage and had the attendant point out the 1948 Packard Convertible Coupe belonging to the appellants. The two investigators had the attendant unlock the car and found the two bags which were admitted in evidence in this case, one of them being open and physically showing that there was radio equipment, the second requiring the opening of a zipper to divulge the same. Two policemen in a "prowler car" were called as a precaution against any violence.

Deputy Marshal Scully arrived in Room 1217 with the Investigator in Charge at about 3:20 P. M., whereupon the three appellants were arrested, and searched the room only to find that no radio equipment was there. Immediately thereafter the Investigator in Charge called his office and was informed

that the radio equipment had been removed from the room and was in the appellants' car at the Motor Ramp Garage. He went directly there and they seized the radio transmitting equipment and receiver.

## SPECIFICATIONS OF ERROR

Under the section entitled "Questions Presented" as set out in appellants' brief, there are five questions presented. In the Specifications of Error eleven assignments are set forth. However, in the Argument, only the five questions which are presented are considered. Therefore, in appellants' brief, only those questions presented which are listed under the section "Argument" in appellants' brief will be considered.

### I.

## ARGUMENT

The argument of appellants on Specifications of Error 1, 2 and 3 relating to suppression and exclusion of Appellants' Exhibits 5 and 6 is a "heads the defendants win, tails the government loses" argument. They maintain the actions of the Government agents in searching a car and seizing the evidence found therein without a search warrant were illegal, and further state that there is no legal way that a search warrant could have been obtained. The ap-



pellants state this very specifically in their brief on pages 18 and 19 as follows:

“Had the officers in this case desired to obtain a warrant for the search of the automobile, it would have been necessary for them to produce evidence tending to show that the baggage contained articles used in the commission of the offense, or were of a contraband nature; otherwise, the attempt to secure the warrant would have been upon mere information and belief, which the courts have held to be insufficient as a basis for the granting of a search warrant.”

Judge Bowen was not willing to accept this tortuous argument. It is difficult to conceive that any judicial decision which must necessarily be based on the “reasonableness” of a search and seizure could be so distorted as to resolve itself into a rule that makes it impossible for an officer to perform his duties.

The general ruling laid down by the Supreme Court relative to the search of vehicles in *Carroll v. United States*, 267 U.S. 132, was used by Judge Bowen as authority for admitting the Government's Exhibits 5 and 6 in evidence. An examination of that case fully justifies the Judge's ruling. The defendants contend that the ruling of the Carroll case applies only to violations of the Prohibition Act, and particularly to the provisions of that Act which provided for search on probable cause, not only of

any vehicle believed to carry contraband, but of the persons in the vehicle.

The Carroll case necessarily dwelt in part on the special provision of the National Prohibition Act since it was ruling on the constitutionality of certain provisions of that Act.

In order to make its special rulings, the Court went into the historical background of the Act and the distinctions drawn in prior acts and decisions concerning search and seizure of evidentiary material when situated in houses or other fixed structures as distinguished from vehicles capable of quick movement.

*Without reference to the special provisions of the National Prohibition Act the Court made the following general statement concerning searches and seizures:*

“We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quick-

ly moved out of the locality or jurisdiction in which the warrant must be sought.”

The holdings in the Carroll case which are dependent on interpretation of the various special provisions of the Prohibition Act are not applicable to the facts of this case.

The case of *United States v. DeRi*, 322 U.S. 581, referred to in the appellants' brief, did not involve facts in any way similar to the subject case. In the DeRi case the Court held that the mere presence of a person in an automobile would not give the right to search his person without his legal arrest unless the search were made under special provisions such as were found in the National Prohibition Act. That situation is not in this case. The complaint and warrant for arrest of the appellants were issued and the defendants were arrested without benefit of any information gained from the physical evidence found in the appellants' car.

The Government officers in this case acted in the only way reasonable after the arrest of the defendant by conducting the search of the car and obtaining the evidence in question. As stated in *Rabinowitz v. U. S.*, 255 U. S. 298, as quoted on page 23 of appellants' brief, the reasonableness of a search and seizure must rest on the facts of each case.

The evidence shows that the appellants were legally arrested in the Benjamin Franklin Hotel. This is uncontested by the appellants. That just prior to arrest, and while the warrant was being obtained, the appellants had placed certain articles which appeared to be luggage in a car owned by one of the appellants and garaged in a public garage used in connection with the hotel where the appellants were registered and where the arrest was made. That Arlowe, the Government officer who obtained the warrant and accompanied the marshal to make the arrest, had no knowledge of the character of the luggage or what it contained until after the arrest. (T.R., page 86)

It was only after a futile search of the room in which the arrest was made that he learned by phone and from the witness, Ames, that the luggage in the car contained radio equipment. (Tr. 144, 145). That he went immediately to the garage and found the car and that a Mr. Donofrio, a companion of appellants who had been in the hotel room at the time of the arrest, had already arrived and declared he had been sent to remove the car. Then, and not until then, the Government officers seized the exhibits in question.

The appellants state that it would have been

impossible for the Government officers to have obtained a search warrant for the car prior to the arrest since until that time they could have only suspicion that the luggage in the car contained the same equipment used in the illegal broadcasts heard to emanate from Room 1217 of the Benjamin Franklin Hotel. In this we agree.

After the arrest and fruitless search of the room for the equipment from which the illegal broadcasts had emanated, then for the first time there was not only reasonable but compelling ground to believe that the equipment in the car was the device used to transmit the illegal signals, and that if not seized immediately it would be quickly driven away. It would have been unreasonable to have reached any other conclusion.

It would have been equally unreasonable to have delayed investigation to obtain a search warrant and not to have done just what Arlowe did, i.e., proceed immediately to the car and seize the equipment; that had to be done immediately.

Donofrio, the appellants' companion at the time of arrest, intended to drive the car away as evidenced by Mr. Donofrio arriving at the garage immediately after the arrest with the announced intention of taking the car. (Tr. 81, 194, 230, 290).



Another phase of the appellants' argument is that the car was two blocks from the scene of the arrest and so too remote to validate a search after arrest. It is common knowledge that in the business and commercial sections of a city the size of Seattle it is usually impossible to park or garage cars within the immediate block or building in which a transient may find hotel accommodations. The car of appellants was as close to the place of arrest as was reasonable. The car was in a public garage across an alley from the hotel, which garage was used in connection with the hotel and the hotel provided pickup and delivery service to guests and kept the claim checks for cars in the guest's box for their convenience. See Tr. page 213, testimony of Mr. Standard, Manager of the hotel. *The appellants had as much control of the car as possible under modern hotel garage conditions and had all the control they chose to have. They had sufficient control to cause the radio equipment to be placed in the car just prior to their arrest.*

It would have been unreasonable indeed for the Government officers to have supinely stood by and allowed Donofrio, agent of the appellants, to drive the car away without seizing the evidence when they not only had reasonable but overwhelming ground to

believe that the car contained radio equipment used to make the illegal broadcasts from the hotel room where the owner of the car had just been arrested. This is just the situation referred to in the Carroll case as not requiring a search warrant.

The conduct of the Government officers Ames and Hallock in keeping surveillance in the garage over the car and its contents after being notified that the appellants intended to check out of the hotel and had in fact caused luggage to be placed in their car, was entirely reasonable and justified. These men knew a warrant was then being obtained for the arrest of the appellants. They were not attempting to search the car or its contents to obtain evidence on which to base the arrest. The complaining officer, as stated above, with reference to the record, did not know the radio equipment was in the car until after the arrest. Ames and Hallock, according to the record on Page 140, went into the garage after receiving a check-out warning by the hotel manager.

“Hallock and I then decided we had better go to the Motor Ramp Garage, because at that time we did not know whether or not the warrant had been served, and we figured at that time, in the event the persons operating this transmitter that we had traced were going to go somewhere, we could follow in our car.”

There they learned that just before their arrival two

bags had been placed in the car. (Tr. page 141). The garage attendant opened the rear of the car where they saw that the bags, the contents of one being exposed through an open zipper, Tr. page 141, contained radio equipment. They did not remove the bags from the car or anything from the bags. (Tr. page 142).

After learning that a warrant was actually issued, a police car was dispatched to the garage by the Superior Officer of Ames and Hallock in case any trouble might develop, (Tr. pages 142-143), or for the purpose of following the appellants if they attempted to get away before the warrant was served for arrest.

“We told the police that we didn’t want them to do anything but stand by in case there was some kind of violence or possibly they could trail the car in the event it did go from the garage.” (Tr. 143).

The Government officers Ames and Hallock hoped they could delay the appellants if they tried a get-away before the warrant was served; if not, they could attempt to follow them. Ames and Hallock hoped to be able to bluff and stall any get-away attempt. (Tr. page 204):

“Yes, I was waiting upstairs, thinking some of these fellows might come in and maybe I could hold them. I had my badge to show who I was.”

It would be a far stretch of imagination to twist the precautionary conduct of Ames and Hallock into an illegal search. There was in fact nothing illegal about the investigation of the car or its contents prior to the arrest. The Government officers at the garage knew a crime had been committed. The latest act of illegal broadcasting had been committed actually in the presence of Ames, one of the Government officers. Ames was within a few feet of the actual operation of the equipment in Room 1217 of the Benjamin Franklin Hotel, just outside the door of that room. Ames and Officer Arlowe double-checked the accuracy of Ames' listening equipment by having Arlowe listen at the door. He heard the identical words through the door that were heard on the listening device. (Tr. pages 137-138):

"A. I again located the center as being Room 1217, and Arlowe was with me. At one time I repeated to Arlowe what I heard so so he could verify what I heard by listening in the door.

Q. Was it the same?

A. It was the same. We compared words.

Q. How was Arlowe listening at that time?

A. He was listening with his ear to the door."

Ames and Hallock further had reliable information that the occupants of the room were checking out and had just caused bags to be placed in their

car in the garage. Ames was in a public garage where he needed no warrant to enter. He was faced with an emergency. He knew from his prior investigation that it was the practice of the operators of the broadcasting equipment to move from place to place, since much time had been spent tracking the signals from hotel to hotel for days.

The law of the Carroll case certainly justified the search of the car without a warrant.

## II.

### ARGUMENT ON SPECIFICATIONS OF ERROR Nos. 4 and 5

Under Section II of the Argument in appellants' brief, specifications of error 4 and 5 are argued. It seems to be the appellants' contention in these two specifications of error that Section 605 of Title 47, U.S.C., prohibits the court from admitting in evidence the contents of messages transmitted by an unlicensed radio station operated by unlicensed personnel. The pertinent portions of Section 605 are quoted in appellants' brief.

Inasmuch as Congress has required that radio stations be licensed and the personnel operating stations be licensed, Congress must certainly have intended Section 605 to apply to licensed radio stations only. It is inconceivable that Congress could have in



any way intended that the privilege set out in Section 605 should apply to unlicensed radio stations as well as to licensed radio stations.

It should be further noted that the last proviso of Section 605 excludes from the privilege set out therein radio messages which are broadcast for the use of the general public. In the case at hand, there is no evidence whatever that the messages were intended for any particular person or persons but were merely broadcast generally. There were no call letters used or any other procedure which would in any way indicate that the messages were intended to be received by any particular person. The only conclusion that can be drawn from the facts is that the information broadcast by the appellants over the unlicensed radio station was for the general use of the public. Therefore, Section 605 does not provide a sanctuary within which the appellants can hide their illegal operations.

### III.

#### ARGUMENT ON SPECIFICATION OF ERROR No. 6

Under Section III of the appellants' argument Specification of Error No. 6 is argued. It seems to be the appellants' contention in Specification of Error No. 6 that since Section 318 of Title 47 gives the

Federal Communications Commission the power to waive or modify the requirement that every radio station be licensed, that Congress has delegated to the Federal Communications Commission to use its discretion as to what persons operating radio stations are violating the law. A careful reading of Section 318 indicates the opposite of the appellants' contention. Section 318 first states in effect that every radio station must be licensed. It then states: "Provided, however, that the Commission if it shall find that the public interest, convenience or necessity will be served thereby may waive or modify the foregoing provisions of this section for the operation of any station \* \* \*." It is obvious from the exact language of the statute that Congress intended to make it a crime to operate an unlicensed radio station, but realized that circumstances might arise where in the public interest, convenience or necessity, it would be improper to prosecute for operating an unlicensed station. Since the operation of a radio station is a highly technical function, Congress wisely gave the Commission the power to waive or modify the requirement of licensing a station when such action would be in the public interest. It is, therefore, obvious that unless the Commission has so waived or modified the requirement that a radio station be licensed that anyone who operates an unlicensed radio station is in

violation of Section 318, and when such acts are done willfully may be punished under the provisions of Section 501 of Title 47. The appellants' contention is therefore, a fallacy. It is not within the discretion of the Commission to determine whether the appellants' acts constituted a crime. It is only within the discretion of the Commission to waive or modify the provisions of Section 318 under the conditions prescribed by Congress. In this case the Commission did not waive or modify the provisions of Section 318 with respect to the operation of the appellants.

The appellants would further seek to mislead the court into believing that the particular radio transmitter in this case was an innocent "walkie talkie" type of device. In order to save the appellants the expense of causing the radio to be shipped to this court, a stipulation was entered into providing that this need not be done. The reason, of course, for the appellants not wanting to ship the radio from Seattle to San Francisco is that it is so heavy and bulky that it would be quite expensive. As a practical matter the radio transmitter was admitted in evidence as an exhibit and the jury had an opportunity to examine its bulk and weight. The transmitter just fit into a trunk-like suitcase, being approximately 30"x12"x18", the same requiring current from a com-

mercial power line for operation. The transmitter could in no sense be considered a "walkie talkie". It is true that it was portable, but certainly could not be operated as a mobile unit unless some means were provided for a regular 110-volt current and a mechanical means of transportation. The transmitter was capable of transmitting a radio signal thousands of miles.

The appellants further complain that the court did not define a radio station in its instructions, and further, that the court did not define the operation of a "walkie talkie". Certainly the general public is beyond the point in this day of enlightenment to need an explanation of the term called "radio station." There being no evidence whatever of any apparatus which might remotely resemble a "walkie talkie" in this case, there was certainly no error in the court's failing to give an instruction in that regard. The court's instructions on Counts IV, V, and VI were very clear as to exactly what the essential elements of the crime were. The jury could in no way have been misled.

The appellants further seek to manufacture some sort of an error in the court's instructions based on the facts that if the appellants were guilty of Counts I, II and III that it was improper for them to also be

convicted on Counts IV, V and VI. While it is true that some of the same elements set out in the first three counts are also present in the elements of the second three counts, that is in no way a benefit to the appellants. The essential element of Counts I, II and III is the operation of an unlicensed radio station. The essential element of Counts IV, V and VI is the operation of a radio station by unlicensed personnel. If the jury had determined that the station was licensed, but that the operators were not licensed, then the appellants would not be guilty of Counts I, II and III, but would have been guilty of Counts IV, V and VI. On the other hand, if the jury had decided that the operators of the station were licensed, but that the station itself was not licensed, then the appellants would not be guilty of Counts IV, V and VI, but would have been guilty of Counts I, II and III. It is not uncommon for defendants to be guilty of violating more than one act of Congress all in one operation.

The appellants further contend that the only testimony relating to interstate commerce is confined to the date of September 7. In this regard the appellants would apparently like to have the court overlook the testimony with regard to the broadcasts being received by vessels upon the navigable waters of Puget Sound.



It is submitted that the entire argument under Section III of the appellants' brief is without merit. The court did not commit any error whatever in his instructions in this case.

#### IV.

#### ARGUMENT ON SPECIFICATION OF ERROR No. 9

In Section IV of the Argument in the appellants' brief Specification No. 9 is argued. It seems to be the appellants' contention in Specification of Error No. 9 and the argument in regard thereto, that since there may have been other persons in the Seattle area who at one time or another have violated the law pertaining to operating radio stations and have not been prosecuted, that these appellants are not guilty themselves. The appellants quote on pages 32 and 33 of their brief certain testimony of Mr. Arlowe. This testimony is to the effect that the Federal Communications Commission first investigates apparent violations of the law to determine what the violators are doing. If the supposed violators are using the radio for more than just testing or in preparing for getting a license, a prosecution is considered. In other words, what Mr. Arlowe is stating in his testimony is that if it appears that some one is not willfully violating the law in the operation of an unlicensed

station that no prosecution is commenced. *It should be noted that Section 501 requires that the unlawful act be done willfully.* Certainly every prosecutor and every investigator is vested with some discretion as to whether or not any given act is or is not willful. In the preparation for trial of every violation of a law requiring willfulness, it is incumbent upon the prosecutor and his investigative staff to determine for themselves whether or not they have sufficient evidence to prove the element of willfulness. It is difficult to understand the appellants' contention that since every individual who has ever transmitted a radio signal without a license has not been prosecuted that somehow or another these appellants are not guilty.

The appellants again seek to mislead the court into believing that this powerful transmitter which was used by these appellants was an insignificant "walkie talkie". This point has previously been covered. The appellants further seek to minimize the offense by stating that the transmitter was worth only \$50.00. This testimony arises from the lips of the appellants themselves and the jury was not compelled to believe such testimony. As a practical matter, the jury, after examining the intricate mechanism of the transmitter, would certainly be justified in de-

termining that its value was probably ten or twenty-fold that amount. The appellants further seek to mislead the court into believing that there was no evidence that any signal was transmitted by the appellants' transmitter. The appellants, of course, rely upon the testimony of the appellants themselves that they did not know whether or not the transmitter was working. In this regard the appellants seek to overlook the fact that the appellants move from hotel to hotel virtually every day. The only explanation for this conduct is that the appellants knew that if they stayed in one place they could be located by direction-finding equipment. Their actions certainly belie their statements that they did not know whether or not the transmitter was operating. This was a matter for the jury to consider, and having decided the same adversely to the appellants, that decision can not now be reversed by this court, there being ample evidence to support it. It should further be called to the court's attention that the law does not require the appellants' signal to have been received by the person for whom it was intended to be guilty.

## V.

ARGUMENT ON  
SPECIFICATION OF ERROR No. 10

In Section V of the Argument set out in appellants' brief Specification of Error No. 10 is argued. The argument on Specification No. 10 is merely a rehash of the arguments set out in Sections III and IV of the appellants' brief. In Section V the appellants further argue that Sections 301 and 318 of Title 47 are unconstitutional, based on the false premise that a violation of these sections can only be committed upon the whim or caprice of an investigating agent. As has been previously stated, Section 501 requires violations of Sections 301 and 318 to have been committed willfully before a defendant can be convicted. The only discretion which has been exercised in this case by the investigative agency and the prosecutor is in determining in their own minds whether or not there was sufficient evidence to prove willfulness. This having been determined, and a grand jury having returned an Indictment, and a jury having found that there was willfulness on the part of the appellants, it is of no avail to the appellants that perhaps in some other cases there should have been a prosecution instituted which was not, and further, there being no evidence in this case to show that the appellants' actions were in any way justi-

fied in the interest of the public, convenience or necessity, there was certainly no basis upon which the Commission could in any way waive or modify the provisions of Section 318 with regard to the operation of the transmitter being used by these appellants. It is interesting to note that the appellants have quoted only a portion of Sections 2, 3 and 4 of Vol. 11, American Jurisprudence, Page 947. The rest of that quotation goes on to state: "The modern tendency is to be more liberal in permitting grants of discretion to administrative bodies or officers in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases."



## CONCLUSION

We dare, for but a single instant, to dwell upon the utter chaos which would exist if the court should find, as a matter of law that these appellants have not violated Sections 301 and 318 of the Communications Act of 1934, as amended. Such a decision would straightway open the door for countless thousands of amateur, as well as commercial, operators of transmitting equipment to jam all the frequencies of the radio spectrum with an uncontrolled flow of traffic. The result would be utter confusion to the public services now rendered by organized and regulated radio operators, would threaten and imperil our national security during this period of war, and would create a serious threat to the integrity of the operation of radio safety and signal devices relied upon by aircraft, the merchant marine and others. The problem of monitoring or policing the airways would be rendered well nigh impossible.

In view of the fact that Congress has already endeavored to exercise the full gamut of its powers in this field, the situation thus created, it must be noted, could not be cured merely by the revision of the instant statute by Congress. In order to find these appellants not guilty, the court must find that there is a hiatus in the field of radio transmission where it is

possible to emit radio signals having no relation to, or effect upon, the sphere of Federal regulation, i.e., interstate commerce. As a result, it would appear that Congress could never invade that segment of activity for the purpose of regulating it.

In conclusion, it is submitted that the search and seizure were not only reasonable under the circumstances, but were incident to a lawful arrest and, further, that the trial judge did not commit any error whatever as claimed by the appellants in their Specifications of Error.

Respectfully submitted,

J. CHARLES DENNIS

*United States Attorney*

VAUGHN E. EVANS

*Assistant United States Attorney*

KENNETH J. SELANDER

*Assistant United States Attorney  
Attorneys for Appellee*



No. 12388

---

United States  
Court of Appeals  
For the Ninth Circuit.

---

ERNEST VERNER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record

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Appeal from the United States District Court,  
Western District of Washington,  
Northern Division.

**FILED**

JAN 10 1950

**PAUL P. O'BRIEN,**

CLERK





No. 12388

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United States  
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Western District of Washington,  
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Seattle 4, Washington

Attorneys for Appellee

United States District Court Western District  
of Washington Northern Division

No. 47760

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERNEST VERNER,

Defendant.

### INDICTMENT

The Grand Jury charges:

#### Count I.

That on or about November 8, 1948, at Seattle, in the Northern Division of the Western District of Washington, Ernest Verner did knowingly deposit and cause to be deposited, for mailing, an envelope, addressed to Milton Fardon, c/o Ford Motor Co., 4141 4th Avenue, South, Seattle, Washington, containing a lewd, lascivious and filthy letter.

All in violation of Section 1461, Title 18, U.S.C.

#### Count II.

That on or about November 8, 1948, at Seattle, in the Northern Division of the Western District of Washington, Ernest Verner did knowingly deposit and cause to be deposited, for mailing, an envelope, addressed to Miss Evelyn Nelson, c/o Ford Motor



Co., 4141 4th Avenue, South, Seattle, Washington,  
containing a lewd, lascivious and filthy letter.

All in violation of Section 1461, Title 18, U.S.C.

A True Bill.

/s/ [Illegible.]

Foreman.

/s/ J. CLARK DEIS,

United States Attorney.

Presented to the Court by the Foreman of the  
Grand Jury in open Court in the presence of the  
Grand Jury, and Filed in the U. S. District Court,  
Dec. 29, 1948.

MILLARD P. THOMAS,

Clerk.

/s/ LEE L. BRUFF,

Deputy.

[Endorsed]: Filed Dec. 29, 1948.

[Title of District Court and Cause.]

Before: The Honorable John C. Bowen,  
District Judge.

Seattle, Washington

January 3, 1949

9:30 o'clock, a.m.

The Court: The Court now has for consideration the Indictment in the case of the United States of America, Plaintiff, vs. Ernest Verner, Defendant, Cause No. 47760. Is that defendant in person now before the Court?

Defendant Verner: Yes, sir.

The Court: With his counsel, Mr. Turner?

Defendant Verner: Yes, sir.

The Court: Has the defendant Verner received from the United States Attorney a copy of this Indictment against him?

Mr. Turner: If Your Honor please, I have received a copy of the Indictment this morning.

The Court: On behalf of this defendant?

Mr. Turner: Yes, Your Honor.

The Court: Will the defendant now observe in that Indictment how his name is written, E-r-n-e-s-t V-e-r-n-e-r?

Defendant Verner: That is right, sir.

The Court: Is that your true and correct name as written in the Indictment?

Defendant Verner: Yes, sir.

The Court: Does the defendant waive the reading of the Indictment?

Mr. Turner: Yes, Your Honor.

The Court: Is he ready to plead to the Indictment?

Mr. Turner: No, Your Honor. On behalf of the defendant, I ask for ten days in which to consider motions against the Indictment. I think I will have some motions.

(Discussion remotions against Indictment.)

The Court: What is your plea to Count I of the Indictment, guilty or not guilty?

Defendant Verner: Not guilty.

The Court: What is your plea to Count II of the Indictment, guilty or not guilty?

Defendant Verner: Not guilty.

The Court: Let this plea be entered. That plea as to each count is without prejudice to his changing that plea if he should later wish to do so before judgment is imposed. It is also subject to his right, within ten days from today, to move against the Indictment.

(Case to be placed on assignment calendar for February 23, 1949.)

[Endorsed]: Filed January 6, 1949.

[Title of District Court and Cause.]

MOTION BY DEFENDANT TO  
DISMISS INDICTMENT

I.

The defendant moves that Count I of the indictment be dismissed on the following grounds:

1. Said count does not state facts sufficient to constitute an offense against the United States.

2. Said count, if it be held to charge an offense, does not state the essential facts constituting such offense.

II.

The defendant moves that Count II of the indictment be dismissed on the following grounds:

1. Said count does not state facts sufficient to constitute an offense against the United States.

2. Said count, if it be held to charge an offense, does not state the essential facts constituting such offense.

/s/ THEODORE S. TURNER,  
Attorney for Defendant.

Office and Post Office Address:  
Room 1020, 1411 Fourth Ave. Bldg.,  
Seattle 1, Washington

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 13, 1949.

[Title of District Court and Cause.]

MOTION OF DEFENDANT  
FOR BILL OF PARTICULARS

Without waiving defendant's motion to dismiss the indictment, defendant moves for a Bill of Particulars setting forth the letters referred to in Counts I and II of the indictment herein.

/s/ THEODORE S. TURNER,  
Attorney for Defendant.

Office and Post Office Address:  
Room 1020, 1411 Fourth Ave. Bldg.,  
Seattle 1, Washington.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 13, 1949.

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[Title of District Court and Cause.]

BILL OF PARTICULARS

Comes now the plaintiff in the above-entitled action and in answer to the defendant's motion for a Bill of Particulars furnishes herewith a photostatic copy of the letter referred to in Counts I and II of the Indictment herein, the letter being the same in both counts of the Indictment.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ VAUGHN E. EVANS,  
Asst. United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed February 21, 1949.



## [PHOTOSTAT COPY OF LETTER]

Mr. Milton Fardan

I wish to take this opportunity at this time to thank you from the bottom of my heart for taking the one and same Verne Thornquist off my hands. It was a problem I have had for many years and was unable to find a way to get rid of her, so you can see what a great favor you have accomplished in such a short while for me.

This letter is not a gripe from a rejected suitor, but from one trying to give you facts and dates so you can judge for yourself, so you wont becomed ensnared in one of her carefully laid and planned traps as others including myself have.

Verne is a girl who will sleep with any man and is a neurotic on the question of intercourse. Any man can make her and I for one have more times than one can remember. The following places can be checked and verified where we have stayed together over weekends and holidays. I have verification of these and under what names we registered. At Spkane, Davenport Hotel, Sillman Hotel, Olson Motor Court, At Yakima, Commercial Hotel, Canyada Lodge, Western Motel, at Cle Elum, Travelers Hotel, at Vancouver Wash., Vancouver Motel, at Graylands Wash. Henry's Auto Court, this one can be verified by Mr. and Mrs. Bothwell who live in the family home and went with us on this trip over Memorial Day.

Also the times when I lived at the house it was a

nightly occurence for her to sneak into my room and get into bed with me.

Milton your are a perfectly good candadate to get involved in her scheme of things and this is how it will work. You will be pitied for having to eat out all the time, and will be asked to take your dinners their at the house and then she will spring the old one, why dont you live with us, we have plenty of room and mother sure could use the money to cut down expenses. Verne has the filthiest mind of any one I have ever come in contact with. Dont let that Church gag throw you. It has been worked on all. She did not get the nickname of Hot Pants at the bank without some reason.

A word to the wise is sufficient and if yoy see fit to continue on be sure and get your share as she is fair screwing.

She will stomp her feet, cry and carry on but you will find out she is a great actress. The records still stand. Dont be a sucker.

Sincerely yours

/s/ ERNEST VERNER.

P.S.

In my estimation she is lower than a common prostitute.

[Title of District Court and Cause.]

PRAECIPE FOR SUBPOENA ON BEHALF  
UNITED STATES

The Clerk of said Court will issue Subpoena for the following-named persons to appear before said Court, at the United States Court Rooms, 1017 U.S. Court House in Seattle, at 4 o'clock, p.m., on the 11th day of July, 1949, then and there to testify in behalf of the United States:

Milton H. Fardon, c/o Ford Motor Co., 4141-4th Ave. South, Seattle, Wash.

Mrs. W. H. (Evelyn) Nelson, 643 West 51st St., Seattle.

This 6th day of July, 1949.

J. CHARLES DENNIS,  
United States Attorney.

[Endorsed]: Filed July 6, 1949.

[Title of District Court and Cause.]

PRAECIPE FOR SUBPOENA  
FOR WITNESSES

To the Clerk of the Above Entitled Court:

Please issue subpoenas directed to the following witnesses requiring them to appear to testify at the trial of the above entitled case on Tuesday, July 12, 1949:

G. William Horton, Residence address: 10545 Interlake, Seattle, Washington.

(employed at Red & Bill's Mobil Service,  
6759 15th Avenue Northwest, Seattle).

Rev. Harry E. Gardner, Address: 1407 Maple Street, Sumner, Washington.

C. G. McMillan, Address: Route 2, Box 338, Poulsbo, Washington.

/s/ THEODORE S. TURNER,  
Attorney for Defendant.

[Endorsed]: Filed July 7, 1949.

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To Milton H. Fardon, c/o Ford Motor Co., 4141-4th  
Ave. South, Seattle, Washington.

You Are Hereby Commanded that laying aside all  
and singular your business and excuses, you be and  
appear in the District Court of the United States  
for the West Dist of Washington at the Courthouse,  
in the city of Seattle, in said district, on the 11th day  
of July A.D. 1949, at 4:00 o'clock p.m. of said day,  
then and there to testify and give evidence on behalf  
of the United States, and not to depart the Court  
without leave thereof, or of the United States At-  
torney.

Witness, the Honorable John C. Bowen, Judge of  
said District Court of the United States, this 6th  
day of July, A.D. 1949, and in the 174th year of the  
Independence of the United States of America.

[Seal]                      MILLARD P. THOMAS,  
Clerk.

By /s/ TRUMAN EGGER,  
Deputy Clerk.

Report to Room 1017  
U S Court House,  
5th & Madison Street.

J. CHARLES DENNIS,  
U. S. Attorney.

U. S. Marshal's Criminal Docket No. 27893.

Received July 6, 1949, United States Marshal,  
Seattle, Wash.



RETURN ON SERVICE

Received this writ at Seattle, Washington on July 6, 1949 and on July 7, 1949 at 2nd and Spring, Seattle, I served it on the within-named Milton H. Fardon and left a true copy thereof or a subpoena ticket with the person named above.

J. S. DENISE,  
U. S. Marshal.

By /s/ JAMES M. SCHWERDFIELD,  
Deputy.

[Endorsed]: Filed July 12, 1949.

---

[Title of District Court and Cause.]

UNITED STATES SUBPENA

To Mrs. W. H. (Evelyn) Nelson 643 West 51st St.,  
Seattle, Wash.

You are Hereby Commanded that laying aside all and singular your business and excuses, you be and appear in the District Court of the United States for the West Dist of Washington at the Courthouse, in the city of Seattle, in said district, on the 11th day of July A.D. 1949, at 4:00 o'clock p.m. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the Court without leave thereof, or the United States Attorney.

Witness, the Honorable John C. Bowen, Judge, of said District Court of the United States, this 6th day of July, A.D. 1949, and in the 174th year of the Independence of the United States of America.

[Seal]                      MILLARD P. THOMAS,  
Clerk.

By /s/ TRUMAN EGGER,  
Deputy Clerk.

Report to Room 1017  
U S Court House  
5th & Spring, Seattle.

J. CHARLES DENNIS.

U. S. Marshal's Criminal Docket No. 27893.

Received July 6, 1949, United States Marshal,  
Seattle Wash.

### RETURN ON SERVICE

Received this writ at Seattle, Washington on July 6, 1949 and on July 6, 1949, 8:55 p.m. at 643 W. 51st, Seattle, I served it on the within-named Evelyn Nelson and left a true copy thereof or a subpoena ticket with the person named above.

J. S. DENISE,  
U. S. Marshal.

By /s/ JAMES M. SCHWERDFIELD,  
Deputy.

[Endorsed]: Filed July 12, 1949.

[Title of District Court and Cause.]

GOVERNMENT'S REQUESTED  
INSTRUCTIONS

Comes now the United States of America, plaintiff herein, and respectfully requests this Honorable Court to give the following instructions in the above-entitled cause:

It is requested that the Court give stock instructions on the following subjects:

1. Presumption of innocence.
2. Intent.
3. Evidence.
4. Reasonable doubt.
5. Credibility.
6. Statements by Counsel.
7. Conclusion.

Instruction No. 8

This is a criminal case. The Grand Jury has returned an Indictment against the defendant in which there are two counts. Each of these counts states a separate crime and you should consider each count separately. I will later explain to you what elements the Government must prove as to each count, but you should remember that you may consider all of the evidence in arriving at your verdict as to each count. You may find from the evidence, beyond a reasonable doubt, that the defendant is

guilty of one count while not guilty of the other count, or you may find the defendant either guilty or not guilty of each count. In other words, it is not necessary that you return the same verdict as to each count unless you are so convinced from the evidence that the same verdict should be rendered as to each count.

### Instruction No. 9

Count I of the Indictment charges:

“That on or about November 8, 1948, at Seattle, in the Northern Division of the Western District of Washington, Ernest Verner did knowingly deposit and cause to be deposited, for mailing, an envelope, addressed to Milton Fardon, c/o Ford Motor Co., 4141 4th Avenue, South, Seattle, Washington, containing a lewd, lascivious and filthy letter.”

The defendant has entered a plea of not guilty to Count I of the Indictment. This places the burden upon the Government to prove each and every material allegation in this count beyond a reasonable doubt. The material allegations which the Government must prove in this count in the Indictment are:

1. That the offense occurred on or about November 8, 1948, in Seattle, Washington.
2. That the defendant knowingly deposited, for mailing, a letter addressed to Milton Fardon.
3. That the said letter was lewd, lascivious and filthy.

If you are convinced, beyond a reasonable doubt, of the truth of each one of these allegations, then it is your duty to return a verdict of guilty. If you are not convinced, beyond a reasonable doubt, of the truth of each one of these three allegations, then it is your duty to return a verdict of not guilty.

Instruction No. 10

Count II of the Indictment charges:

“That on or about November 8, 1948, at Seattle, in the Northern Division of the Western District of Washington, Ernest Verner did knowingly deposit and cause to be deposited, for mailing, an envelope, addressed to Miss Evelyn Nelson, c/o Ford Motor Co., 4141 4th Avenue, South, Seattle, Washington, containing a lewd, lascivious and filthy letter.”

The defendant has entered a plea of not guilty to Count II of the Indictment. This places the burden upon the Government to prove each and every material allegation in this count beyond a reasonable doubt. The material allegations which the Government must prove in this count in the Indictment are:

1. That the offense occurred on or about November 8, 1948, in Seattle, Washington.
2. That the defendant knowingly deposited, for mailing, a letter addressed to Miss Evelyn Nelson.
3. That the said letter was lewd, lascivious and filthy.

If you are convinced, beyond a reasonable doubt,



of the truth of each one of these allegations, then it is your duty to return a verdict of guilty. If you are not convinced, beyond a reasonable doubt, of the truth of each one of these three allegations, then it is your duty to return a verdict of not guilty.

### Instruction No. 11

The terms "lewd," "lascivious" and "filthy" have been used in these instructions and in the Indictment. These words have no different meaning in this case than that meaning which is ordinarily given to those terms when used outside of the court room.

The definition of "lewd" as given by the dictionary is "wicked; viscious; worthless; base; lustful; lascivious; unchaste."

The definition in the dictionary given for the term "lascivious" is "wanton; lewd; lustful; tending to produce lewd emotions."

The definition given in the dictionary for the term "filthy" is "defiled with filth; disgustingly dirty; foul; obscene." The term "filthy" has also been described as "meaning what it commonly or ordinarily signifies, that which is nasty, dirty, vulgar, indecent, offensive to the moral sense, morally depraving and debasing."

You will apply these definitions of the terms "lewd," "lascivious" and "filthy" in your deliberations when determining whether or not the letters alleged to have been mailed by the defendant fall within this category.

## Instruction No. 12

It is your duty as jurors and officers of this court to follow my instructions as to the law as I have given them to you. You are not permitted to disregard my instructions merely because you may not approve of the law as passed by Congress, or because you may have a different idea as to what the law ought to be. It is the Court's duty to determine the law of this case and it is your duty as jurors to determine the facts of this case in accordance with these instructions.

In arriving at your verdict you should not allow sympathy or prejudice to influence your judgment. If the defendant is guilty, no amount of sympathy will make him innocent. Likewise, if the defendant is innocent, no amount of prejudice will make him guilty.

You are not concerned with what the punishment might be in the event you should return a verdict of guilty. The degree of punishment is a matter which the Court, alone, must decide. In other words, it is the duty of you as jurors to determine the facts of this case and it is my duty as the trial judge to determine the degree of punishment in the event a verdict of guilty is returned.

[Endorsed]: Filed July 12, 1949.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED  
INSTRUCTIONS

Defendant respectfully requests the Court to include in its instructions to the Jury the following:

Respectfully submitted,

/s/ THEODORE S. TURNER,  
Attorney for defendant.

No. 1

You are instructed that the statute referred to in the indictment provides, insofar as here material, that every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, is declared to be nonmailable matter and shall not be conveyed in the mails, and that whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, shall be fined not more than \$5,000.00 or imprisoned not more than five years, or both.

No. 2

You are instructed that the words "lewd," "lascivious," and "filthy," as used in the statute, have reference to that form of immorality which relates to sexual impurity. In order for a sealed letter addressed to a single addressee to be lewd, lascivious and filthy within the meaning of the statute, it must contain matter offensive to the sense of chastity and naturally calculated or tending to suggest to the ad-

dressee or to create in his mind libidinous thoughts or to excite or give rise to sexually impure desires in the addressee and it must also have a tendency to deprave the moral senses of the addressee by suggesting or appealing to sexual lust.

A letter which is merely coarse, vulgar, disgusting, indecent, or defamatory, or a combination of all of these would not be lewd, lascivious, or filthy within the meaning of the statute unless it was also calculated to corrupt and debauch the mind and morals of the addressee.

Unless you are satisfied beyond a reasonable doubt that the letter in evidence and described in count 1 was lewd, lascivious, and filthy as those terms are defined in these instructions, you will acquit the defendant on count 1.

Unless you are satisfied beyond a reasonable doubt that the letter in evidence and described in count 2 was lewd, lascivious, and filthy as these terms are defined to you in these instructions, you will acquit the defendant on count 2.

### No. 3

You are instructed that if a letter is addressed to a definite person and deposited in the United States mail for delivery to that person, there is no presumption that the letter will fall into the hands of any person other than the addressee of the letter.

### No. 4

You are instructed that the purpose, object and effect of a letter is to be judged by you from its

contents as a whole, and from the circumstances of its mailing, including the identity of the addressee, if any, his background, age, experience, position, and interest, if any, in the subject-matter of the letter.

With further reference to the contents of the letter, you are instructed that you should not judge it solely by one or more isolated words or phrases which, considered by themselves, might happen to be lewd, lascivious or filthy as defined to you by these instructions. You should, on the contrary, consider the dominant or controlling effect or character of the whole letter, and judge its effect in connection with all of the circumstances as above mentioned.

#### No. 5

If the purpose, object or effect of letter is to give information to the addressee in which the addressee would have a legitimate interest, rather than to corrupt or deprave the morals of the addressee, then you are instructed that the purpose, object or effect is not unlawful, and its mailing would not constitute a violation of the statute.

[Endorsed]: Filed July 12, 1949.



[Title of District Court and Cause.]

DEFENDANT'S MEMORANDUM OF AU-  
THORITIES FOR USE OF THE TRIAL  
COURT

Preliminary Statement

The indictment charges in two counts that the defendant mailed an envelope "containing a lewd, lascivious and filthy letter," in violation of Title 18, U.S.C. Section 1461. The counts are identical, except for the addressees; Milton Fardon is the addressee in the first count, and Miss Evelyn Nelson in the second.

The charge of the indictment is obviously made under the first paragraph of Section 1461, Title 18 U.S.C., which reads as follows:

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; . . ." is declared to be nonmailable, and whoever knowingly deposits such matter shall be fined or imprisoned or both.

There is no allegation in the indictment that the letter was of such a character as to corrupt the morals of the addressee or of such persons who might receive the letter. The letter which forms the basis of the charge is addressed to Milton Fardon, and in substance warns him not to become involved with Mrs. Verne Thornquist, who is alleged in the letter to be a person of unchaste character. The letter itself is couched in vulgar

language, and accuses Mrs. Thornquist of immorality. The letter is admittedly vulgar and obscene within the ordinary lay acceptation of the term; the question is whether it is "lewd, lascivious, and filthy" as those terms are used in the statute.

The defense is that this letter, although vulgar, is not of such character as would tend to corrupt or debase the morals of the persons to whom it was addressed; that its only effects would be to shock and disgust the reader and warn him against acts of immorality and would not provoke or simulate libidinous thoughts or desires; and that the statute makes unmailable only such letters as would tend to provoke or incite in the reader morally corrupt, lewd or lascivious desires and would tend to corrupt or debase his morals.

The defendant's evidence will show that prior to the time he became involved with Mrs. Thornquist, he had been happily married for many years, was a respectable, lawabiding citizen, and active church member, and held a responsible position in a bank. Mrs. Thornquist, who at the time had a husband of her own, divorced that husband and set out to take Mr. Verner away from Mrs. Verner, to whom he was happily married. Mr. Verner, after a period of time, fell a victim for one year or possibly more, formed an illicit relationship with Mrs. Thornquist, left Mrs. Verner, and instituted one or more actions of divorce against her. However, he finally came to his senses, and went back to Mrs. Verner. Thereupon Mrs. Thornquist en-

gaged in the most extreme and even fantastic forms of persecution and harassment of both Mr. and Mrs. Verner in an endeavor to induce Mr. Verner again to leave Mrs. Verner and to join her. Various means were tried by the Verners to get rid of Mrs. Thornquist and try to reestablish their married life under normal conditions, but without much success. Finally Mr. Verner wrote the letters charged on the theory that by exposing Mrs. Thornquist at the place where she was employed he would render her harmless. The letters were sealed and obviously not designed for general distribution. One was addressed to Mr. Fardon, who, as the evidence will no doubt show, had been married before, and had just started associating with Mrs. Thornquist. The other was addressed to Mrs. Evelyn Nelson (incorrectly described in the indictment as "Miss"), who is married and living with her husband, and who is Secretary to the head of the department in the Ford Motor Company, by which Mrs. Thornquist is employed. We believe the evidence will show that the letter had no tendency whatsoever to deprave or corrupt the morals of either of these persons, and therefore the letters were not banned by the statute.

## I.

### Purpose and Construction of the Statute

The words "obscene," "lewd," "lascivious," as used in the statute, have the meaning that has been imputed to them at common law, viz., that which

has a tendency to deprave and corrupt the morals of those whose minds are open to such influences by arousing and implanting therein obscene, lewd, or lascivious thoughts and desires relating to sexual impurity:

Swearingen v. U.S., 161 U.S. 446, 16 S.C. 562, 40 L.ed. 765;

Dysart v. U.S., 272 U.S. 655, 47 S.C. 234, 71 L.ed. 461;

U.S. v. Dennett, (C.C.A. 2d), 39 Fed. (2d) 564, 76 A.L.R. 1092;

Davis v. U.S., (C.C.A. 6th), 62 Fed. (2d) 473;  
Note, 76 L.ed. 845, 848.

Swearingen v. U. S., *supra*, defendant was charged with mailing a newspaper containing an obscene, lewd and lascivious article. The article is set forth in a footnote to the Court's opinion, and is similar in its language and general tone to the letters charged in the case at bar. The Court reversed the conviction, saying at page 451:

"The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.

"Referring to this newspaper article, as found in the record, it is undeniable that its language is

exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious, and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall."

In *Dysart v. U. S.*, *supra*, the charge was based upon the mailing of a postcard and letter advertising a nursing home for unmarried women during pregnancy. The letter stressed the point that the home was private and designed for the protection of unfortunate women until they were able to return to their homes and friends, free from the burden of their mistake. There were eleven counts, based on the mailing of the identical letter to various unmarried women. The Supreme Court reversed defendant's conviction, saying at page 658:

"Notwithstanding the inexcusable action of petitioner in sending these advertisements to refined women, it is not possible for us to conclude that the indictment charges an offense within the meaning of the statute as construed by the opinion just cited. The motion to quash should have been sustained by the trial court."

In accordance with the rule of the *Swearingen* case, it is uniformly held that a letter which is merely coarse, vulgar, disgusting or libelous, and which does not tend to deprave the morals by inciting lascivious or lewd thoughts or desires, does not fall within the ban of the statute:



U. S. v. Wroblenski, (D.C. Wis. 1902) 118 Fed. 495 (letter written by defendant to his mother, charging her with adulterous relations, and containing indecent language);

U. S. v. O'Donnell, (C.C. N.Y., 1908) 165 Fed. 218 (letter calling a third party many unpleasant, scurrilous and disgusting names);

U. S. v. Males, (D.C. Ind. 1892) 51 Fed. 41 (Valentine mailed to a woman containing coarse, vulgar and insulting language).

### Effect of Circumstances of Mailing or Publication

Construing this statute, the Courts have recognized that certain publications or writings, if published only to selected persons, would have no tendency to deprave or corrupt, but if distributed generally, might fall into the hands of persons who might be corrupted. In the former case, no offense is committed; in the latter, mailing would constitute a violation. It is, therefore, incumbent upon the Government to prove that the act charged comes within the ban of the statute. Thus, in *U. S. v. Dennett*, (C.C.A. 2d, 1930) 39 Fed. (2d) 564, in which the charge was based on the mailing of a pamphlet designed for the instruction of children in sex matters, the Court said:

“In other words, a publication might be distributed among doctors or nurses or adults in cases where the distribution among small children could not be justified. The fact that the latter might obtain it accidentally or surreptitiously, as they might

see some medical books which would not be desirable for them to read, would hardly be sufficient to bar a publication otherwise proper.”

This case was cited with approval by the 9th Circuit Court of Appeals in *McKnight v. U. S.*, 78 Fed. (2d) 931, 933.

The distinction between printed publications and private sealed letter was clearly pointed out by the Court in *U.S. v. Wroblenski*, 118 F. 495, *supra*, where the court says at page 496:

“If it were a publication, or the matter were sent to a young person or a stranger, I am not sure that these definitions would exclude the language or suggestion of the letter. But I am of the opinion that the general test is not applicable alike to publications and sealed private letters. In either case the question of violation of the statute rests upon the import and presumed motive, and not upon the mere terms of the communication. Thus its tendency depends upon circumstances, and unexceptionable language may convey vicious information within the statute. *Dunlap v. U.S.*, *supra*. In the case of a private letter (sealed) there is no publication (*U.S. v. Chase*, *supra*), and no presumption arises of intention to give publicity, or that it will be read by others than the addressee. The language or communication may be free from the condemnation of the statute in one instance, while it would clearly fall within it when addressed to other persons. So the inquiry as to the tendency of the letter must be narrowed to its liability to

corrupt the addressee, and no such tendency can be imputed to this letter to the mother of the defendant.

The motion to quash the indictment must be sustained accordingly.”

In the case at bar, the letters mentioned in both counts of the indictment were sealed letters. Hence, the question is whether under the evidence the letters were of such a character as to tend to deprave and corrupt the morals of the two addressees named in the indictment. If there is no evidence that the morals of these two addressees were in danger of corruption, the charge is not sustained.

#### Document Is to Be Judged by its Effect as a Whole

It is well settled that a document is to be judged in accordance with its dominant effect, and not merely by isolated words or passages. Thus, a document or book when considered as a whole might be perfectly proper, yet contain several words or passages which taken by themselves would be considered indecent or obscene; in such cases, the document or book is characterized by its dominant effect, and not by the isolated words or passages:

*U.S. v. One Book Entitled Ulysses*, (C.C.A. 2d 1934) 72 F. (2d) 705, 708;

*Parmelee v. U.S.*, (App. D.C. 1940) 113 F. (2d) 729;

*Walker v. Popenoe*, (App. D.C.) 149 F. (2d) 511, 512.

## Construction of "Filthy"

There has been no reported decision construing the word "filthy" as used in Section 1461 of Title 18 U.S.C., being the Revised Code of Criminal Procedure. It is defendant's position that this word should be construed as meaning something akin to the words "obscene" and "lewd," and having a tendency to deprave or corrupt the morals. The Government will no doubt contend that the tendency to corrupt is not an essential element of the crime charged, and that this case is controlled by the case of *U.S. v. Limehouse*, (D.C. So. Car. 1931) 58 F. (2d) 395; *rev. U.S. v. Limehouse*, (1932) 285 U.S. 424, 52 S.C. 412, 76 L.ed. 843.

Since the holding of the Limehouse case has an important bearing on the construction of the statute in its present form, it must be closely analyzed.

At the time of the Limehouse Case, the statute was 18 U.S.C. 334, and the pertinent part read as follows:

"Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, . . . is hereby declared to be nonmailable matter . . ." etc.

The indictment contained thirty counts, each charging the mailing of "a certain filthy letter." While the letter does not appear in the opinion, the Supreme Court says of it:

"contained much foul language; charged the ad-

dressees or persons associated with them with sexual immorality"; that they "were coarse, vulgar, disgusting, indecent, and unquestionably filthy within the popular meaning of that term."

The District Court gave to the word "filthy" a meaning somewhat similar to the meanings of "obscene, lewd and lascivious" as defined in *Searingen v. U.S.*, *supra*, and sustained a demurrer to the indictment. The Supreme Court reversed, saying at page 426:

"The indictment here under review contains no reference to 'obscene, lewd, or lascivious.' The charge is of depositing 'a certain filthy letter.' It is brought under the amendment to Sec. 3893 of the Revised Statutes made by Sec. 211 of the Criminal Code, Act of March 4, 1909, chap. 321, 35 Stat. at L. 1088, 1129, U.S.C. title 18, Sec. 334, which inserted the words, 'and every filthy.' Now the clause reads 'every obscene, lewd or lascivious, and every filthy, book, . . . letter.'

"The lower court failed to recognize that the amendment introduced, not merely a word, but a phrase. Disregarding the collocation of the words, it treated the amended clause as if it had read 'obscene, lewd, lascivious, or filthy'; and then, applying the doctrine of *noscitur a sociis*, gave to 'filthy' the meaning attributed in the *Swearingen Case* to the words 'obscene, lewd, or lascivious.' Thus, the court emptied the amendment of all meaning. We think that it is a more natural read-



ing of the clause to hold that by the amendment Congress added a new class of unmailable matter,—the filthy. The letters here in question plainly relate to sexual matters. We have no occasion to consider whether filthy letters of a different character fall within the prohibition of the Act.”

The plain implication of the holding in the second paragraph above quoted is that if the statute had then read “obscene, lewd, lascivious, or filthy,” the construction given by the trial court would have been correct, and that the letters would not constitute an offense unless they had a tendency to corrupt.

Thereafter Congress revised the Criminal Code and amended this portion of the statute to read “every obscene, lewd and lascivious, or filthy book . . .”, etc.—exactly in accordance with the wording which the Supreme Court has said would make the tendency to corrupt an essential part of the offense. Therefore, we do not have to surmise what will be the Supreme Court’s construction of the statute as now worded; Congress has amended the statute to conform to the wording spelled out by the Supreme Court itself.

A reference to the Reviser’s Notes makes this conclusion even stronger. At page 2562 of Title 18 U.S.C., Congressional Service, will be found the Reviser’s Notes on Sec. 1461. The Revisers called the attention of Congress to the legislative history of the statute, and cites four cases, namely:

Youngs Rubber Corporation, Inc., v. C. I. Lee & Co., Inc., 45 F. (2d) 103;

U.S. v. Nicholas, 97 F. (2d) 510;

Davis v. U.S., 62 F. (2d) 473;

U.S. v. One Package, 86 F. (2d) 737.

The Revisers quote from these cases and summarize them, stressing the point that the statute is designed to prohibit only that which contends to corrupt, and does not prohibit that which has a proper use or purpose. In particular, the Revisers quote from the Youngs Rubber case, as follows:

“Section 334 (this section) forbids also the mailing of obscene books and writings; yet it has never been thought to bar from the mails medical writings sent to or by physicians for proper purposes, though of a character which would render them highly indecent if sent broadcast to all classes of persons.”

The Revisers also summarized the holding in the Davis case that it is necessary for the Government to prove that the intent of the person mailing a circular conveying information relative to contraception that the article should be used for the condemned purpose was necessary for conviction, and in the absence of such intent, conviction is not warranted.

There is absolutely nothing in the Revisor's Notes to suggest that matter which is simply vul-

gar or filthy, but not having a tendency to corrupt morals is prohibited by the statute.

Respectfully submitted,

/s/ THEODORE S. TURNER,  
Attorney for Defendant.

[Endorsed]: Filed July 12, 1949.

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[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above-Entitled Cause, Find the defendant, Ernest Verner, is guilty as charged in Count I of the Indictment; and further find the defendant, Ernest Verner, is guilty as charged in Count II of the Indictment.

/s/ JAMES W. FRAZIER,  
Foreman.

[Endorsed]: Filed July 13, 1949.

[Title of District Court and Cause.]

DEFENDANT SUBPOENA IN A CRIMINAL  
CASE

To C. G. McMillan, Route 2, Box 338, Poulsbo,  
Washington:

You Are Hereby Commanded to appear before  
the Hon. John C. Bowen, Court Room No. 1, in  
the District Court of the United States for the  
Western District of Washington, Northern Divi-  
sion at the United States Court House, 5th Ave.,  
and Spring Street, in the city of Seattle, in said  
District, on the 12th day of July, A.D. 1949, at  
10:00 o'clock a.m. of said day, then and there to  
testify on behalf of the Defendant Ernest Verner  
in the above-entitled cause.

Witness, the Honorable John C. Bowen, Judge  
of the District Court of the United States for the  
Western District of Washington, and the seal there-  
of, this 7th day of July, A.D. 1949.

THEODORE S. TURNER,  
Attorney for Defendant.

[Seal] MILLARD P. THOMAS,  
Clerk.

By JACK W. KOERNER,  
Deputy Clerk.

U. S. Marshal's Criminal Docket No. 27893.

Received July 7, 1949, United States Marshal,  
Seattle, Wash.

RETURN ON SERVICE

Received this writ at Seattle, Washington, on July 11, 1949, and on July 11, 1949 at Seattle, Washington, I served it on the within-named C. G. McMillan and left a true copy thereof or a subpoena ticket with the person named above.

Marshal's Fees: Service \$.50: \$.50.

J. S. DENISE,  
U. S. Marshal.

By /s/ MARION C. SINCLAIR,  
Deputy.

[Endorsed]: Filed July 14, 1949.

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[Title of District Court and Cause.]

DEFENDANT SUBPOENA IN A CRIMINAL  
CASE

To G. William Horton, 10545 Interlake, Seattle, Washington (employed at Red & Bill's Mobil Service), 6759 15th Avenue Northwest, Seattle, Wash.:

You Are Hereby Commanded to appear before the Hon. John C. Bowen, Court Room No. 1, in the District Court of the United States for the Western District of Washington, Northern Division, at the United States Court House, 5th Ave., and Spring Street, in the city of Seattle, in said District, on the 12th day of July, A.D. 1949, at 10:00 o'clock a.m. of said day, then and there to testify



on behalf of the Defendant, Ernest Verner, in the above-entitled cause.

Witness, the Honorable John C. Bowen, Judge of the District Court of the United States for the Western District of Washington, and the seal thereof, this 7th day of July, A.D. 1949.

THEODORE S. TURNER,

Attorney for Defendant.

U. S. Marshal's Criminal Docket No. 27893.

[Seal]

MILLARD P. THOMAS,

Clerk.

By JACK W. KOERNER,

Deputy Clerk.

Received July 7, 1949, United States Marshal, Seattle, Wash.

### RETURN ON SERVICE

Received this writ at Seattle, Washington, on July 7, 1949, and on July 7, 1949, 4:30 P.M., at 6759 15th N.W., Seattle, I served it on the within-named G. William Horton, and left a true copy thereof or a subpoena ticket with the person named above.

Marshal's Fee: Travel, \$6.42; Service, \$.50; \$6.92.

J. S. DENISE,

U. S. Marshal.

By /s/ JAMES M. SCHWERDFIELD,

Deputy.

[Endorsed]: Filed July 14, 1949.

[Title of District Court and Cause.]

DEFENDANT SUBPOENA IN A CRIMINAL  
CASE

To Reverend Harry E. Gardner, 1407 Maple  
Street, Sumner, Washington.

You Are Hereby Commanded to appear before  
the Hon. John C. Bowen, Court Room No. 1, in the  
District Court of the United States for the West-  
ern District of Washington, Northern Division, at  
the United States Court House, 5th Ave., and  
Spring Street, in the city of Seattle, in said Dis-  
trict, on the 12th day of July, A.D. 1949, at 10:00  
o'clock a.m. of said day, then and there to testify  
on behalf of the Defendant, Ernest Verner, in the  
above-entitled cause.

Witness, the Honorable John C. Bowen, Judge of  
the District Court of the United States for the  
Western District of Washington, and the seal there-  
of, this 7th day of July, A.D. 1949.

THEODORE S. TURNER,  
Attorney for Defendant.

U. S. Marshal's Criminal Docket No. 27893.

[Seal]                      MILLARD P. THOMAS,  
Clerk.

By JACK W. KOERNER,  
Deputy Clerk.

Received July 7, 1949, United States Marshal,  
Seattle, Wash.

## RETURN ON SERVICE

Received this writ at Tacoma, Washington, on July 8, 1949, and on July 8, 1949, at Sumner, Washington, I served it on the within-named Rev. Harry E. Gardner, and tendered to him and he accepted witness fees in the sum of \$4.00 and mileage in the sum of \$4.34, and left a true copy thereof or a subpoena ticket with the person named above.

Marshal's Fees: Travel, \$1.44; Service, \$.50; \$1.94.

J. S. DENISE,  
U. S. Marshal.

By /s/ [Illegible.]  
Deputy.

[Endorsed]: Filed July 14, 1949.

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[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL  
(RENEWED) AND ALTERNATIVE MOTION FOR NEW TRIAL

Comes now the defendant and renews his motion for judgment of acquittal made at the close of the evidence for the Government and again at the close of all the evidence, on the ground that the evidence is insufficient to sustain a conviction of either of the offenses charged in Counts I and II of the indictment herein.

In the alternative, defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The Court erred in sustaining objections to questions addressed to the witness Milton Fardan relative to the effect upon him of receiving the letter charged in Count I.

5. The Court erred in refusing defendant's offer of proof concerning the effect upon the said Milton Fardan of receiving the letter charged in Count I of the indictment.

6. The Court erred in sustaining objections to questions addressed to the witness Evelyn Nelson relative to the effect upon her of receiving the letter charged in Count II of the indictment.

7. The Court erred in refusing defendant's offer of proof relative to the effect upon Evelyn Nelson of receiving the letter charged in Count II of the indictment.

/s/ THEODORE S. TURNER,  
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 18, 1949.

United States District Court, Western District of  
Washington, Northern Division

No. 47760

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERNEST VERNER,

Defendant.

JUDGMENT, SENTENCE AND  
COMMITMENT

On this 22nd day of July, 1949, the attorney for the Government, and the defendant, Ernest Verner, appearing in person, the defendant being represented by Theodore S. Turner, his attorney, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Counts I and II thereof; that the Probation Officer of this District has made a presentence investigation and report to the Court; now, therefore,

It Is Adjudged that the defendant, Ernest Verner, has been convicted by jury verdict and is guilty of the offense of violation of Section 1461, Title 18, U.S.C., as charged in Counts I and II of Indictment, and the Court having asked the defendant whether he has anything to say why judg-



ment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged and Ordered that the defendant, Ernest Verner, be committed to the custody of the Attorney General of the United States for imprisonment in the Federal Prison Camp at McNeil Island, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Twelve Months on Count I of the Indictment, and for the period of Twelve Months on Count II of the Indictment, the execution of the sentence on Count II to be concurrent with, and not consecutive to, the execution of the sentence on Count I.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done in Open Court this 22nd day of July, 1949.

/s/ JOHN C. BOWEN,

U. S. District Judge.

Presented by:

/s/ VAUGHN E. EVANS,

Asst. U. S. Attorney.

Violation: Sec. 1461, Title 18, U.S.C. (Depositing Obscene Mail Matter in U. S. Mails.)

[Endorsed]: Filed July 22, 1949.

[Title of District Court and Cause.]

### APPEAL BOND

Whereas, there is now on deposit in the Registry of the Court the sum of Two Hundred Dollars (\$200.00) cash bail to secure the appearance of the defendant above named at the trial of this cause, and it is his desire and that of Margaret Verner who deposited the same in his behalf that it be applied on account of the appeal bond of One Thousand Dollars (\$1000.00) fixed by the Court, and whereas, there is herewith tendered to the Clerk of said Court the further sum of Eight Hundred Dollars (\$800.00) in cash, being the balance of the said sum of One Thousand Dollars (\$1000.00), making the total sum of One Thousand Dollars (\$1000.00) cash bond on appeal, and it being the intention of the defendant to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, sentence and commitment entered in the above-entitled cause July 22, 1949, the condition of this bond being as follows:

Whereas, the said Ernest Verner shall diligently prosecute his appeal to the Circuit Court of Appeals for the Ninth Circuit, that he shall be firmly bound by the conditions of this bond, and if the said cause on appeal be affirmed then he shall surrender himself in execution of said judgment and sentence and if the said cause be reversed by the said Circuit Court of Appeals that he shall personally appear in accordance with the said rever-

sal for retrial, from day to day when ordered by the Court, and shall at all times comply with any and all orders of the Court, and for these purposes this bond shall be in full force and effect; and if all conditions are complied with by the said Ernest Verner, the principal, until the final disposition of the said case, then this bond shall be held for naught; but if the defendant fails to appear as ordered, payment of the amount of the bond shall be due forthwith.

If the bond is forfeited, and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the District Court of the United States for the Western District of Washington against the principal on said bond and the surety for the sum of One Thousand Dollars (\$1,000.00), and the cash herein deposited shall apply on said judgment.

Dated at Seattle, Washington, this 22nd day of July, 1949.

/s/ ERNEST VERNER,  
Principal.

/s/ MARGARET VERNER,  
Surety.

Receipt of Eight Hundred Dollars (\$800.00) additional cash bail acknowledged.

/s/ MILLARD P. THOMAS,  
Clerk of United States District Court, Western District of Washington.

Approved as to form:

/s/ VAUGHN E. EVANS,  
U. S. Attorney.

Approved:

/s/ JOHN C. BOWEN,  
U. S. District Judge.

Approved and Presented:

By /s/ THEODORE S. TURNER,  
/s/ W. HAROLD HUTCHINSON,  
Counsel for Defendant.

[Endorsed]: Filed July 22, 1949.

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[Letterhead]

Drs. Ahlquist and Kepl  
Paulsen Medical and Dental Building  
Spokane 8, Washington

December 20, 1948.

Mr. Theodore S. Turner,  
1411 Fourth Avenue Bldg.,  
Seattle 1, Washington

Dear Sir:

Mr. Verner was treated by me in April, 1947, at which time he was suffering from a very severe depression. He was not psychotic; was in good contact with reality, but was having severe emotional disturbances.

During a marked depression he took an over-

dose of sleeping tablets which necessitated prompt treatment. He made a good recovery. I did not contact him again after this episode.

Yours very truly,

/s/ M. F. KEPL, M.D.

MFK:s

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[Letterhead]

Trinity Methodist Church  
West 65th Street and 23rd Avenue N.W.  
Seattle 7, Washington

1407 Maple Street,  
Sumner, Washington,  
December 23, 1948.

To Whom It May Concern:

As the above letterhead indicates, I was pastor of the Trinity Methodist Church, beginning in June, 1942, and continuing until June, 1946.

When I went to Trinity Church I found Mr. Ernest Verner the Treasurer of the Sunday School, that had about \$500.00 to \$700.00 on hands and in his care.

Mr. Verner was quiet, efficient, dependable and faithful. Our relationship was very pleasant and his services very helpful and appreciated.

This relationship continued for three years tho the last year was broken in attendance and the monies were placed in the church vault for periods



of time and then turned over to him. His handling was always careful and accurate.

I tried to be of help to Mr. and Mrs. Verner after the "certain woman" came into the scene. I found Mr. Verner under tremendous strain and stress.

When out of actual touch with him I wrote him that I was sure that his character and training would never allow him to have peace of mind or true happiness until he came back to his wife and lived true to his marriage vows.

I think some things said by me and also written helped to keep him from being completely carried away by the woman who seemed to be doing all in her power to pull him away from his home and wife. But I am also quite sure it tended to bring on the sharper conflict in his mind and soul in the matter of passion desires and duty and loyalty.

As I wrote him when he was away, so again now I declare to all men, I believed in and still believe in the honesty, and the fundamental good character of Ernest Verner.

Weak he was and tempted. But I believe he tried hard to live what he believed. And tho he failed for a time the outcome but confirms my belief.

Very sincerely,

/s/ HARRY E. GARDNER.

[Letterhead]

Paul F. Phares, D.O.

Porter Building

Woodland, California

December 21, 1945.

To Whom It May Concern

Re: Mr. Ernest Verner:

Due to insinuating circumstances Mr. Verner is not improving as rapidly as he should, and I feel it is advisable that he have at least an additional three months' rest.

Very truly yours,

/s/ PAUL F. PHARES, D.O.

PFP.ck

[Endorsed]: Filed July 22, 1949.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Name and address of appellant: Ernest Verner,  
1007 West 67th Street, Seattle, Washington.

Name and address of appellant's attorney: Theodore S. Turner, 1411 Fourth Ave. Bldg., Seattle 1, Washington.

Offense: Mailing lewd, lascivious and filthy letter in violation of Section 1461, Title 18, U.S.C. (two counts).

Concise statement of judgment and sentence: Judgment and sentence entered July 22, 1949, adjudging that defendant has been convicted by jury verdict and is guilty of violation of Section 1461, Title 18, U.S.C., as charged in the indictment, Counts I and II, and sentencing defendant to imprisonment in the Federal Prison Camp at McNeil Island, Washington, for twelve months on Count I and twelve months on Count II, to run concurrently.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated July 28, 1949.

ERNEST VERNER,

Appellant.

By THEODORE S. TURNER,

Appellant's Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed July 28, 1949.

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[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME FOR  
FILING RECORD ON APPEAL

It Is Hereby Stipulated by and between the parties above named, acting through the undersigned, their respective attorneys, that the time for filing the record on appeal in the above cause with the Circuit Court of Appeals for the Ninth Circuit may be extended to October 26, 1949.

Dated at Seattle, Washington, this 17th day of August, 1949.

J. CHARLES DENNIS,  
U. S. Attorney,

By /s/ VAUGHN E. EVANS,  
Assistant U. S. Attorney,  
Attorneys for Plaintiff.

/s/ THEODORE S. TURNER,  
Attorney for Defendant.

[Endorsed]: Filed Aug. 17, 1949.

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[Title of District Court and Cause.]

MOTION TO EXTEND TIME FOR FILING  
RECORD ON APPEAL

Comes now the defendant and moves the Court for an order extending the time to file with the Circuit Court of Appeals for the Ninth Circuit the record on appeal in the above-entitled cause to October 26, 1949, which date is the ninetieth day from the date of filing the notice of appeal in said cause.

This motion is based upon all the files, records and proceedings herein and upon the accompanying affidavit of Theodore S. Turner.

/s/ THEODORE S. TURNER,  
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 17, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF THEODORE S. TURNER IN  
SUPPORT OF MOTION TO EXTEND  
TIME FOR FILING RECORD ON AP-  
PEAL

State of Washington,  
County of Kings—ss.

Theodore S. Turner, being first duly sworn, on oath deposes and says:

Affiant is the attorney for the Defendant in the above cause. Notice of appeal was filed July 28, 1949. Promptly thereafter affiant attempted to reach the court reporter who reported the testimony at the trial of this cause, but she was then on vacation and affiant did not hear from her until August 9, on which date she informed affiant that it would be impossible for her to prepare a transcript of the testimony and proceedings at the trial within the forty days after July 28, and that the earliest date on which she could hope to prepare such a transcript would be September 19, 1949. She also informed affiant that she had transcripts to prepare in connection with appeals in other causes.

Affiant believes that approximately three weeks will be necessary after receipt of the transcript of testimony in order to prepare and transmit to the Circuit Court of Appeals the record on appeal. Since affiant has no guarantee that the transcript of testimony will actually be received on Septem-



ber 19, affiant believes that it is reasonably necessary that the time be extended to October 26, 1949.

/s/ THEODORE S. TURNER.

Subscribed and sworn to before me this 17th day of August, 1949.

[Seal]      /s/ W. HAROLD HUTCHINSON,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 17, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
RECORD ON APPEAL

On motion of Defendant, and the stipulation of the parties, and the Court having considered the affidavit of Theodore S. Turner in support of the Motion, It Is Hereby

Ordered That the time for filing the record on appeal in this cause in the Circuit Court of Appeals for the Ninth Circuit be, and it hereby is, extended to October 26, 1949.

Done In Open Court this 17th day of August, 1949.

/s/ JOHN C. BOWEN,  
Judge.

Presented by:

/s/ THEODORE S. TURNER,  
Attorney for Defendant.

O. K. as to form:

J. CHARLES DENNIS,  
U. S. Attorney.

By /s/ VAUGHN E. EVANS,  
Asst. U. S. Attorney,  
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 17, 1949.

[Title of District Court and Cause.]

PETITION TO REDUCE SENTENCE

Comes Now the defendant and respectfully petitions the above honorable court for a reduction of the sentence imposed herein.

This motion is based upon the records in this court and the affidavit filed herewith, and it respectfully requested that oral testimony be permitted with respect to this petition.

/s/ ERNEST VERNER,  
Defendant.

/s/ ALLAN POMEROY,  
Attorney for Petitioner.

Receipt of copy acknowledged.

[Endorsed]: Filed September 16, 19949.

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[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,  
County of King—ss.

Margaret Verner, being first duly sworn on oath, deposes and says: That she is the wife of the defendant herein, having married him August 20, 1926, and ever since have been husband and wife. That in the early days of her marriage to the defendant she worked as general clerk at the Metropolitan

Branch of the Seattle First National Bank, but that she has not been employed since 1932 except for a short period in the summer of 1945 when she attempted to relieve persons on vacation at the same bank.

That since her husband has been arrested and she and her husband have been without funds, she has been trying to work 15 hours a week on a relief job. That she and her husband are entirely without funds because of the terrific expense to which they have been subjected during the past year; that her husband has been earning approximately the sum of \$350 per month as an accountant working for himself; that they own their own home; that they have no automobile or other personal property of any kind or description. That the bail of \$1,000 which was placed with the Court in this case was borrowed from the bank and that a note has been signed with the bank to evidence the loan of this money.

That this affiant has suffered intensely as a result of this entire episode beginning with the time that Mrs. Vern Thornquist began consorting with the husband of this affiant; that as a result of shock suffered through this entire affair she lost a premature baby; that she has been to doctors and has been consulting Dr. Bowers recently, and has been advised by him that she needs an operation for what the doctor believes to be a growth; that a number of years ago she suffered a serious accident and since said time she has been unable to control her

weight and her general condition is such that the doctor believes she should not work at all.

That ever since the affair started between the defendant herein and Mrs. Thornquist, this affiant's life has been a nightmare; that when the defendant and this affiant attempted to withdraw from any association with Mrs. Thornquist, many threats were made by Mrs. Thornquist to the effect that she would get even with Mr. and Mrs. Verner. Mrs. Thornquist threatened to see that Mr. Verner would lose every job he ever got; she came to the home of this affiant several times and once with Mrs. Thornquist's mother, and demanded that the Verners get a divorce so that Mrs. Thornquist could marry Mr. Verner. When Mrs. Verner asked Mrs. Thornquist's mother what she thought of a daughter like that, the mother answered to the effect that "the laws of love are greater than the laws of God and man". Mrs. Thornquist has called the police claiming that Mr. Verner had stolen her purse and once claimed that he had stolen packages from her out of an automobile, and when confronted by the police with the truth, admitted that all she wanted was to be near Mr. Verner. On one occasion Mrs. Thornquist came to the home of this affiant and told her she was to leave her husband immediately and if she didn't leave him immediately, that she would send him to the penitentiary and spread the names of Mr. and Mrs. Verner all over the front pages of the newspapers. In January, 1937, Mrs. Thornquist accosted this affiant on the sidewalk near



the Bon Marche and struck her down, the result of which was the placing of Mrs. Thornquist under a peace bond by action of a Justice of the Peace.

That as a result of the events outlined herein and many others too numerous to mention, this affiant and her husband have been hunted in Seattle, Spokane and San Francisco.

That while this affiant is not familiar with courts, nor the legal implications of the trial or cases, she has the belief and feeling that the case of her husband was being pushed rapidly through the trial because of the statement there were other cases waiting and this case must be hurried. This affiant also feels that if given more time, more evidence could have been given by her husband and herself in respect to his case. That at the time of sentencing many of the things contained herein were not brought to the Court's attention. That this affiant has followed the sentences for other offenses and that persons have been sentenced to 3 months on marihuana and 6 months on perjury and other light sentences as compared with the severe penalty which she feels has been placed against her husband.

That this affiant desires the court to know that through all these hardships she has resolutely kept her marriage and in spite of the hardships encountered desires to keep her home and husband, and because of her condition, the severe penalty of the sentence herein imposed will work extreme hardship on her economic and financial condition,

and respectfully requests the court to reduce the sentence herein imposed.

/s/ MARGARET VERNER.

Subscribed And Sworn To before me this 15th day of September, 1949.

[Seal]      /s/ MARIAN M. PARKS,

Notary Public in and for the State of Washington,  
residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 16, 1949.

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[Title of District Court and Cause.]

COURT'S DECISION ON DEFENDANT'S  
PETITION FOR REDUCTION OF SENTENCE

Announced September 16, 1949

The Court: We have had many lengthy hearings in this case. We had a very lengthy hearing at the time of imposition of judgment and sentence.

By counsel for defendant this matter was fully presented and by the Court was fully considered at the time of imposition of judgment and sentence. That is true with respect to the effect of the sentence upon Mrs. Verner.

The defendant is lucky that he did not receive a penitentiary sentence, which likely would have been imposed upon him had it not been for the Court's

consideration of the effect upon his wife of such imprisonment.

The Court will not change the sentence unless required by an appellate court to do so.

All pending motions and petitions are denied.

[Endorsed]: Filed September 16, 1949.

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[Title of District Court and Cause.]

### DESIGNATION OF RECORD ON APPEAL

To The Clerk Of The Above-Named Court:

In making up the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, you will please include all original papers filed therein, together with this designation of record.

Filed this 5th day of October, 1949.

/s/ ALLAN POMEROY and

/s/ ERNEST R. CLUCK,

Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 11, 1949.

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMISSION  
OF ORIGINAL EXHIBITS

Upon Application of the defendant, and with the consent of the United States Attorney,

It Is Ordered that the Clerk of this Court is authorized and directed to transmit to the Circuit Court of Appeals for the Ninth Circuit, all original papers and exhibits filed in this cause.

Done In Open Court this 11th day of October, 1949.

/s/ JOHN C. BOWEN,  
Judge.

Presented by:

/s/ ERNEST R. CLUCK,  
ALLAN POMEROY and  
ERNEST R. CLUCK,  
Attorneys for Defendant.

OK as to form:

J. CHARLES DENNIS,  
U. S. Attorney.

By /s/ J. CHARLES DENNIS,  
U. S. Attorney,  
Attorney for Plaintiff.

[Endorsed]: Filed October 11, 1949.

In the District Court of the United States for the  
Western District of Washington Northern Division

No. 47760

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERNEST VERNER,

Defendant.

Before: The Honorable John C. Bowen,  
District Judge.

# TRANSCRIPT OF PROCEEDINGS AT TRIAL

Seattle, Washington

July 12, 1949, 10:00 o'Clock, A.M.

## Appearances:

Vaughn E. Evans, Assistant United States Attorney, appearing for and on behalf of plaintiff.

Theodore S. Turner, appearing for and on behalf of defendant.

Whereupon, a jury having been duly impaneled and opening statement having been made on behalf of plaintiff, the following proceedings were had and done, to-wit:

\* \* \*

The Court: Plaintiff may call its first witness.



Mr. Evans: Mr. Mein. [2\*]

BERNARD MEIN

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

Q. Will you state your full name, please, and spell your last name for the reporter?

A. Bernard M-e-i-n.

Q. Where are you employed?

A. At Seattle as a post office inspector.

Q. How long have you been employed as a post office inspector?      A. Twenty-two years.

Q. I will ask you whether or not you have been Inspector in Charge of the investigation of this case?

A. I was in charge of the investigation of this case, yes sir.

Q. I will ask you whether or not at any time during the course of your investigation you ever talked with the defendant, Mr. Verner?

A. I did. [3]

Q. I will ask you whether or not you took a signed statement from him?      A. I did.

Q. Do you have that signed statement with you?

A. I have the statement, yes sir.

(Statement marked Plaintiff's Exhibit 1 for Identification.)

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\* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Testimony of Bernard Mein.)

Q. Handing you what has been marked as Plaintiff's Exhibit 1 for Identification, will you state whether or not you can identify it? A. I can.

Q. Will you state what it is without revealing its contents?

A. It is a voluntary statement made by Mr. Verner and signed by him in my presence and in the presence of Inspector Wasson.

Q. I will ask you whether or not your signature appears thereon as a witness? A. It does.

Q. I will ask you whether or not Mr. Wasson's signature appears thereon as a witness?

A. It does.

Mr. Evans: I offer Plaintiff's Exhibit 1.

Mr. Turner: If the Court please, the defendant objects that this evidence is not admissible at this time. I take it that the Exhibit is intended as a confession, and I understand the rule to be that evidence of the fact some crime has been committed must first be produced before a confession is admitted.

The Court: What is the theory?

Mr. Evans: If the government does not produce a corpus delicti before the government closes its case, of course, the case will not go to the jury.

The Court: The objection is sustained subject to further proof.

Q. I will ask you whether or not at the time you were talking to Mr. Verner, at the time this

(Testimony of Bernard Mein.)

statement was signed, if you had with you any other documents which you exhibited to Mr. Verner.

A. I had the letters involved in the case.

Q. Do you have those with you now?

A. I have them with me now, yes sir.

(Envelope marked Plaintiff's Exhibit 2 for Identification.)

(Letter marked Plaintiff's Exhibit 3 for Identification.)

(Envelope marked Plaintiff's Exhibit 4 for Identification.) [5]

(Letter marked Plaintiff's Exhibit 5 for Identification.)

Q. You have been handed what has been marked for identification as Plaintiff's Exhibits 2 and 3. I will ask you whether or not you can identify them?

A. I can.

Q. Without revealing their contents, will you state what they are?

A. Number 2 is a letter addressed to Milton Fardon.

Q. A letter or an envelope?

A. Well, an envelope. The letter was in the envelope. We call them letters, but it is an envelope addressed to Mr. Milton Fardon.

Q. What is Number 3?

A. Number 3 is the letter enclosed in the envelope, Number 2, addressed to Mr. Milton Fardon.

(Testimony of Bernard Mein.)

Q. I will ask you from whom if anyone you first received Exhibits 2 and 3?

A. Exhibit 2 was submitted to me by Mr. Fardon on November 30 last.

Q. I will ask you whether or not you made any notations on Exhibit 2 to that effect?

A. I did make a notation, the date I received it and my initials. [6]

Q. Are there any other markings on Exhibit 2 which were put there either by you or someone else after you received it?

A. After I received it, Mr. Fardon also initialed it as the envelope which he had received.

Q. As to Exhibit 3, I will ask you whether or not there are any identifying marks on that which you have placed there?

A. That also has the identifying mark on it, the date and the initials both of myself and the initials of Mr. Fardon.

Q. Your initials appear on there in one or two places?

A. On two places, the date, the time he handed it to me.

Q. Whom do you mean by he?

A. Mr. Fardon.

Q. What is the other?

A. The other was the date Mr. Fardon initialed it as well as myself.

Q. Will you look at what has been marked for

(Testimony of Bernard Mein.)

identification as Plaintiff's Exhibit 4 and 5 and state whether or not you can identify them?

A. I can.

Q. Without revealing their contents, would you state what they are? [7]

A. Number 4 is an envelope addressed to Evelyn Nelson.

Q. I will ask you whether or not there are any identifying marks on that which you can identify?

A. There is an identification mark on that, the date and the initials of Mrs. Nelson and my initials.

Q. As to number 5, I will ask you whether or not there are any identification marks on that?

A. That also contains the date, the initials of Mrs. Nelson and my initials.

Q. I will ask you whether or not the envelope which is marked for Identification as Exhibit 2 bears any stamps or any postmarks?

A. Number 2 bears the postmark of Seattle, Washington.

Q. Don't read it; just say whether or not it does. A. Yes, it does bear a postmark.

Q. Are there any stamps on it?

A. There is a canceled postage stamp.

Q. As to what has been marked for Identification as Exhibit 4, I will ask you the same question?

A. That also bears a postmark and a postage stamp canceled.

Q. I will ask you whether or not at the time you took the signed statement which has been



(Testimony of Bernard Mein.)

marked for Identification as Plaintiff's Exhibit 1 you also had with you and in your possession Exhibits 2, 3, 4 and 5? [8]           A. I did.

Mr. Turner: I object to that as immaterial for the same reason. Counsel is endeavoring to prove by hearsay testimony that a crime has been committed instead of calling the witnesses who know of their own knowledge. It does not yet appear how Mr. Mein can identify Exhibits 3 and 5, but I expect to cross-examine him before that letter is offered, at the time it is offered. I think at that time he will frankly admit that there is nothing on Exhibits 3 and 5 to show on their face that they ever came through the mail, and the only means by which he claims that is the fact is on the basis of hearsay testimony.

The government has subpoenaed Mr. Fardon and Mrs. Nelson. They are present. They are witnesses who know of their own knowledge and there is no reason why they should not be called, and the case go on in an orderly way. Counsel is trying to put in a confession before proving that a crime has been committed.

The Court: The objection is overruled.

Q. Will you answer the question please?

A. I did.

Q. I will ask you whether or not at the time you took the signed statement which has been marked for Identification as Exhibit 1, you exhibited to the

(Testimony of Bernard Mein.)

defendant what has been [9] marked for Identification as Exhibits 2, 3, 4 and 5?      A. I did.

Mr. Turner: Just a moment, please. I object. The purpose of that question is obviously to get around Your Honor's ruling of a moment ago that the objection to the offer of confession would be sustained subject to further proof. This question can only call for an answer as to whether or not the defendant admitted. This is not direct evidence that a crime has been committed.

The Court: The Court wishes to hear the question again.

(Last question read by reporter.)

The Court: Overruled.

Q. Will you answer the question, please?

A. I did.

Q. I will ask you whether or not the defendant made any statement in respect to whether or not he had ever seen Exhibits 2, 3, 4 and 5 before?

Mr. Turner: Just a moment, please. There is the same question that your Honor has already ruled upon that it is calling for the confession and there is no evidence that a crime has been committed.

The Court: The objection is overruled.

Q. Do you recall what the question was? [10]

A. Yes. The defendant said he had seen them and mailed them.

Mr. Turner: I didn't understand the answer.

The Witness: The defendant said he had written them and mailed them.

(Testimony of Bernard Mein.)

Mr. Turner: If your Honor please, I move to strike the answer as not responsive and also that it is inadmissible because no substantive evidence of the crime has been offered, and that it is in conflict with Your Honor's previous rulings.

The Court: The objection not responsive is sustained. All of the witness's statement after the word "Yes" is stricken and the jury will disregard it.

Q. I will ask you whether or not you interrogated the defendant on the question of whether Exhibit 2, 3, 4 and 5 had ever been placed in the mail by him?

Mr. Turner: I object to that as immaterial at this time, not proper order of proof.

The Court: The objection is overruled.

The Witness: I did.

Q. And what if anything did the defendant say in response to such interrogation?

Mr. Turner: Same objection, if Your Honor please.

The Court: Overruled.

The Witness: He said he did. [11]

Q. He said he did what?

A. Mailed them, prepared them and mailed them.

Q. I will ask you whether or not you reduced to writing the statements which the defendant said in regard to having mailed these letters?

A. I did.

Q. I will ask you whether or not that statement

(Testimony of Bernard Mein.)

is the statement contained in Exhibit 1, which is marked for Identification as such?

A. It is.

Mr. Evans: I again offer Exhibit 1.

Mr. Turner: Same objection if Your Honor please.

The Court: The objection is sustained subject to further proof.

Mr. Evans: I would like to reserve the right to recall this witness. I have no further questions at this time of this witness.

The Court: You may do that. You may cross-examine.

Mr. Turner: May I reserve cross-examination?

The Court: You may do so. Remain in attendance until you are later excused by the Court.

(Witness excused.)

The Court: Call plaintiff's next witness.

Mr. Evans: Mr. Fardon. [12]

### MILTON FARDON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Evans:

Q. Will you state your full name and spell your last name for the reporter please?

A. Milton H. F-a-r-d-o-n.

Q. Where do you live?

(Testimony of Milton Fardon.)

A. 1729 - 12th Avenue, Seattle.

Q. I will ask you where you work?

A. Washington Mutual Bank.

Q. I will ask you whether or not you have ever worked for the Ford Motor Company?

A. I did, yes.

Q. I will ask you whether or not you ever received mail at the Ford Motor Company?

A. I did.

Q. Handing you what has been marked for Identification as Plaintiff's Exhibits 2 and 3, can you find those in front of you? [13] A. Yes.

Q. Without revealing their contents, will you state whether or not you can identify Plaintiff's Exhibits 2 and 3 for identification?

A. Yes, I can.

Q. I will ask you what they are, without revealing the contents?

A. Number 2 is an envelope and number 3 is a letter.

Q. I will ask you whether or not you ever received those in the mail? A. Yes, I did.

Q. Do you recall about what date?

A. Sometime around November 9th or 10th.

The Court: Of what year?

The Witness: 1948.

Q. I will ask you whether or not the envelope was sealed at the time you received it?

A. Yes, it was.

Q. I will ask you whether or not what has been



marked for Identification as Exhibit 3 was in the envelope at the time you received it?

A. It was.

Q. I will ask you whether or not there are any identifying marks on Exhibits 2 and 3 by which you can further identify the letter and the envelope? [14]

A. My initials are on them.

Q. I will ask you who if anybody you turned the letter and envelope over to? A. Mr. Mein.

Mr. Evans: I offer Plaintiff's Exhibits 2 and 3.

Mr. Turner: No objection, Your Honor.

The Court: Each of them is admitted.

(Plaintiff's Exhibits 2 and 3 received in evidence.)

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## PLAINTIFF'S EXHIBIT NO. 2

[Envelope postmarked]: Seattle, Wash., Nov. 8, 1948, 3:30 p.m.

Milton Fardan  
c/o Ford Motor Co.  
4141 4th Ave. So.  
Seattle, Wn.

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## PLAINTIFF'S EXHIBIT NO. 3

[Letter]

Mr. Milton Fardan

I wish to take this opportunity at this time to

## Plaintiff's Exhibit No. 3 (Continued)

thank you from the bottom of my heart for taking the one and same Verne Thornquist off my hands. It was a problem I have had for many years and was unable to find a way to get rid of her, so you can see what a great favor you have accomplished in such a short while for me.

This letter is not a gripe from a rejected suitor, but from one trying to give you facts and dates so you can judge for yourself, so you wont becomed ensnared in one of her carefully laid and planned traps as others including myself have.

Verne is a girl who will sleep with any man and is a neurotic on the question of intercourse. Any man can make her and I for one have more times than one can remember. The following places can be checked and verified where we have stayed together over week ends and holidays. I have verification of these and under what names we registered. At Spokane, Davenport Hotel, Sillman Hotel, Olson Motor Court, At Yakima, Commercial Hotel, Canyada Lodge, Western Motel at Cle Elum, Travelers Hotel, at Vancouver Wash., Vancouver Motel, at Graylands Wash. Henry's Auto Court, this one can be verified by Mr. and Mrs. Bothwell who live in the family home and went with us on this trip over Memorial Day.

Also the times when I lived at the house it was a nightly, occurence for her to sneak into my room and get into bed with me.

Milton your are a perfectly good candadate to get involved in her scheme of things and this is how

## Plaintiff's Exhibit No. 3 (Continued)

it will work. You will be pitied for having to eat out all the time, and will be asked to take your dinners there at the house and then she will spring the old one, why don't you live with us, we have plenty of room and mother sure could use the money to cut down expenses. Verne has the filthiest mind of any one I have ever come in contact with. Don't let that Church gag throw you. It has been worked on all. She did not get the nickname of Hot Pants at the bank without some reason.

A word to the wise is sufficient and if you see fit to continue on be sure and get your share as she is fair screwing.

She will stomp her feet, cry and carry on but you will find out she is a great actress. The records still stand. Don't be a sucker.

Sincerely yours,

/s/ ERNEST VERNER.

P.S. In my estimation she is lower than a common prostitute.

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(Testimony of Milton Fardon.)

Mr. Evans: No further questions.

## Cross-Examination

By Mr. Turner:

Q. Will you state your age?

A. Forty-three.

Q. How long have you lived in Seattle?

(Testimony of Milton Fardon.)

A. A year and a half.

Q. Formerly where did you live?

A. New York City.

Q. What was your occupation there?

A. Policeman.

Q. How long were you a policeman?

A. Twenty years.

Q. Were you a plain clothesman? Patrolman, or what? [15]      A. Patrolman.

Mr. Evans: I object to the question. I think he has gone far enough into the backround of this witness. It is not within the scope of the direct examination.

Mr. Turner: I think it goes to the very fundamentals of the case.

The Court: Do you mean affecting the witness's credibility or what do you mean?

Mr. Turner: Under the law applied as interpreted by the cases, the identity and background of the addressee of a sealed letter are very relevant circumstances in determining whether any offense at all has been committed.

The Court: It is difficult for me to see what your purpose is. Are you going to prove this witness is not to be believed under oath or his testimony is to be discredited in some way?

Mr. Turner: No, Your Honor, just part of the circumstances relating to receipt of the letter. In other words, a sealed letter not intended for general distribution must be judged according to different standards than that of a newspaper or book that

(Testimony of Milton Fardon.)

is sold and distributed generally among the public, and the primary object of the Statute under which this charge is laid is to prevent the use of the mails for the [16] purpose of corrupting or depraving the morals of persons who might receive things deposited in the mails.

In the case of a sealed letter not intended for anyone else, it becomes very material to know what is the status of the addressee. There are many authorities on that point.

Where are the authorities which you mention?

Mr. Turner: Swearingen vs. U. S., cited on page 3 of the brief filed by the defendant. It gives the general rule to be applied in the interpretation of the Statute and then we come down to more specific cases.

The Dennett case on page 5 of the brief points out the distinction in circumstances dependent on the character of the reader or class of readers for whom a particular publication is intended.

Then we come down to the case of State vs. Wroblenski, one of the most extreme cases in the books, and the Court very clearly points out that in the case of a sealed private letter the question is not what might be the effect of the letter if distributed generally to the public at large, but rather the effect upon the addressee, and that is the purpose of this examination, Your Honor.

The Court: The objection is overruled. [17]

Q. Will you read the question please?

(Last question read by reporter.)



(Testimony of Milton Fardon.)

A. Patrolman.

Q. That was in New York City proper?

A. Yes, sir.

Q. As a matter of fact, part of the time you were in portions of New York where you saw a great deal of not only what we call ordinary life but the seamy side of life too, didn't you?

A. Yes, I did.

Q. In twenty years in New York City on the police force as a patrolman, you had a great variety of experience?

A. Yes, I did.

Q. Some of the cases you handled involved questions of morals?

A. No.

Q. Did you have occasion to see transactions or events that affected the questions of morals as a patrolman in New York City?

A. I think you should—you should be a little more specific with a question like that. I don't know how I can answer that.

Mr. Evans: I am going to object to this line of questioning. I don't think it is pertinent to the issues here. [18]

The Court: The objection is overruled. I am not entirely convinced of the theory but out of an abundance of caution, the Court will permit the inquiry. Proceed and be as brief as possible.

Q. Have you been married?

A. Yes, I have.

Q. How long were you married?

A. Thirteen years.

(Testimony of Milton Fardon.)

Q. Are you married at the present time?

A. No, I am not.

Q. You are divorced? A. Yes, I am.

Q. When were you divorced?

Mr. Evans: I object to the question.

The Court: Overruled.

A. About five years.

Q. You were married just the once?

A. Yes, once.

Q. Did you have any children? A. No.

Mr. Evans: I object to this. This certainly can't have any——

The Court: This objection is sustained as to whether or not he had any children.

Q. When you received this letter, what effect did it [19] produce upon you? State your reactions to the letter.

Mr. Evans: I am going to object to that. That is absolutely immaterial and irrelevant in this case. The only issue involved here is as to whether or not this letter was mailed by the defendant, whether or not it is lewd, lascivious and filthy, and those are the only issues involved.

Mr. Turner: It is evidentiary, bearing on the ultimate issue. I think Mr. Evans is right in stating that if he states it as the ultimate issue.

The Court: The objection is overruled.

Mr. Evans: May I address the court in the absence of the jury?

The Court: The jury will retire now until 1:30 under the Court's previous admonitions.

(Jury retires.)

The Court: I think it would be helpful for counsel for the government to prepare his argument for reception by the Court after the noon recess, after you have read the cases and after you have brought to the Court's attention any that you might wish to in response. I believe the Court would be aided substantially by the citation of any authorities which you think support your position.

Court is recessed until 1:30 this afternoon. [20]

(At 12:05 o'clock p.m., Tuesday, July 12, 1949, proceedings recessed until 1:30 o'clock p.m., Tuesday, July 12, 1949.)

Seattle, Washington

July 12, 1949, 1:30 o'clock p.m.

The Court: I will hear you now, Mr. Evans.

Mr. Evans: I have had an opportunity to review the theory of the defense which is set out in this brief. It appears to me that the theory of the defense is not at all applicable to this case. This is not a case where a communication has been sent to a doctor or to a relative or to someone who is known to the sender. Nor has the communication which has been sent here any legitimate use.

Referring to the revisor's notes, it seems that the obvious exception that they set out there are cases where the article or the communication might be capable of legitimate use and where the sender was sending it in good faith for that legitimate use. Here we have a communication that its sole and only

purpose is to advertise a woman allegedly according to the letter to be of loose morals. Certainly that has no legitimate [21] use. Certainly the sender cannot claim good faith.

Referring even to the quotations from the Swearingen case which counsel has cited for us, "The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity and have the same meaning as given them at common law in prosecutions for obscene libel."

A letter such as this certainly falls within that classification. As near as I can see from counsel's examination of one of the prosecuting witnesses here, Mr. Fardon, there has been an attempt to show that because he is a law enforcement officer, had some considerable experience, because he has been married and because he is an adult, that anyone can send him any type of lewd and obscene literature and be free from prosecution. Certainly that is not the type of exception that has been set out in the statutes.

In one of the cases cited here which counsel says is his strongest case, the Wroblenski case, it was a communication which the defendant wrote to his mother. I believe he accused her of certain wrongful acts. This is not such a case. There is no showing here that Mr. Fardon ever knew or met the sender of this communication. Certainly unless the cross-examination shows—I don't believe it is even proper cross-examination, not being [22] within the

scope of direct examination—unless there is some showing of relationship either knowing them or some professional relationship whereby the recipient would be a doctor or something of that nature, where the information sent would have some legitimate purpose then the line of cross-examination that has been followed by counsel for the defense should not be admitted. It has come to my attention that one of the witnesses which the government has called was called by counsel for the defendant on the telephone, I believe yesterday, perhaps the day before, and informed that he was going to cross-examine her on the relationship between the defendant here and the woman whose name is mentioned in the communication. It seems to me the sole purpose of such a telephone call or such information being given to a prospective witness is for the purpose of making her fearful of being embarrassed on the witness stand by being asked things that we normally don't like to talk about in public.

It seems to me that the purpose of this cross-examination here this morning has been solely for the purpose of trying to embarrass the witness in one manner or another, which is certainly not the proper purpose of cross-examination. All it has shown is that he is an adult, has been married, has been a law [23] enforcement officer. Certainly that does not place him in the category of a doctor or any person who could legitimately use the information in this communication.

I don't believe any of the cases which counsel



has cited here come even close to being applicable to the issues involved in this case. It is the government's contention that the issues involved in this case are first, whether or not the letter was mailed by the defendant in this jurisdiction; and whether or not the communication was lewd, lascivious, and filthy, or any one of those three. Those are the only issues that are properly subject to this lawsuit.

The Court: Mr. Evans, your argument is very weighty and the Court is grateful to you for the same. Have you any law that you want to cite that causes you to think what you say you think?

Mr. Evans: I have only had opportunity to look at the law cited in the brief and I believe I am amply supported by the cases which counsel cites.

The Court: Take those cases and read the words in the reports of them which you say support you in that.

Mr. Evans: Referring to counsel's quotation of the Swearingen case on page 4 of his brief, the citation is 161 U.S. 446, 16 Supreme Court 562, 40 Law Edition 765, wherein the Supreme Court states: [24]

"The words 'obscene', 'lewd' and 'lascivious' as used in the statute signify that form of immorality which has relation to sexual impurity and have the same meaning as is given them at common law in prosecutions for obscene libel."

I rely upon those words and upon the words in the Dennett case, which is a second circuit case, 39 F. (2) 564.

The Court: Do you have the new Title 18?

Mr. Evans: Yes, I do, Your Honor.

The Court: Will you turn to the table in that and convert this section 1461 into the old statute and see if there is anything there, any annotations in the old statute relating to this subject? What is the section in the old statute?

Mr. Evans: 334 is the old section, Your Honor, and there are voluminous citations in the old section.

The Court: I have the old section with me. Do you have 334?

Mr. Evans: I have it before me, Your Honor.

The Court: Will you turn to the annotations? There may be some cases there which support your contentions.

Mr. Evans: Yes, I see a number of cases here. I am referring to number 21 and 24. Under 21, the case of Knowles vs. U. S., 170 F. 409. Number 21 is on page [25] 100 of the bound section of the volume.

The Court: Under "Intent, Motive or Purpose"?

Mr. Evans: Under "Intent, Motive or Purpose", I believe. There are some pertinent annotations there, particularly the first one:

"In a prosecution for depositing obscene matter in the mails, the purpose of the defendant is immaterial, and that his motive was good is no defense."

Under note 41 on the following page, 101, under the title "Obscene Matters Within the Statute", there are a number of cases cited there, the title

being, "Objectionable Matter in General". The Swearingen case is cited and used virtually in the identical language which I have just quoted to the Court from the defendant's brief. The Knowles case is again cited there, stating:

"The word 'obscene' should be given in this statute as broad a significance as it had in common law."

The Court: Is that the one, U. S. vs. Martin, where that is cited? The Knowles case does not seem to have any direct bearing on whether or not this line of inquiry is permissible. I am trying to get some light from a decided case on the question now before the Court; namely, that one raised by the Government that this line of inquiry is improper on cross-examination. [26]

Court is recessed for ten minutes. You are permitted to go back to your office and see if you can find a statement that will help the Court in ruling upon the Government's objection to this line of inquiry.

Mr. Turner may go to the law library and see if he can find anything further that will indicate whether this is admissible or not.

(Recess.)

The Court: I would like for both sides to see this one case, the case of U. S. vs. Musgrave, 160 F. 700, the pertinent language in the opinion of the Court, on page 706 in the paragraph which starts in the lower third of that page. I will submit it to counsel for defendant and then counsel for plaintiff.

There is one other case I have seen which seems to report the Court's instructions to the jury. They are very brief. It is a very skeltonized statement in 28 F. Reporter, at page 524, in the case of U. S. vs. Bebout.

I will hear your comment as to whether you think that case is in point on the question here. I understand there that the matter was mailed from a man to his wife.

Mr. Turner: Yes. I was trying to see whether a copy of the letter was set out in the opinion.

The Court: That point is not raised. I think the [27] opinion deals with the subject matter of the discussion as being unquestionably lewd and lascivious within the meaning of the Statute. Is that language in point on the question here?

Mr. Evans: I believe it is, Your Honor.

The Court: Here is the language in this other case.

“Nor does the statute make a purpose or intent to deprave or demoralize the public, or injure individuals, an ingredient to constitute the offense. Nor does the truth or falsity of the publication make any part of the offense; the only inquiry being, was the publication obscene or indecent and was it placed in the mails for circulation in violation of the statute?”

Mr. Evans: I believe those are strictly the issues involved here, Your Honor.

The Court: Have you any cases, Mr. Evans,

which you would like to call to the Court's attention?

Mr. Evans: I believe the Court has just read from the *Bebout* case, which is one I had marked to call to the Court's attention.

The Court: The language I just read is from what purports to be the instructions of the trial judge to the jury.

Mr. Evans: Following the note in the annotations very closely, it is somewhat abbreviated. I have been [28] unable to find anything directly on this point, Your Honor, in my limited time. I have searched as diligently as I can and I am sorry I am unable to give the Court any more authorities.

Mr. Turner: If the Court please, I think that both of those cases, when properly understood, state the law. I think that the effect that counsel is endeavoring to give to them is not correct, and if that would be the proper construction, then I do not think they state the law as announced in the controlling cases.

Before pointing out this language that I think closes the issue here entirely, I would like to point out the difficulty that the courts have had in dealing with somewhat analogous ideas from two different points of view. There is much language in the books to the effect that the purpose or motive of the sender of a writing alleged to be obscene is immaterial. There are many instances of that. The *Knowles* case is one, and it is easiest to make the point by briefly summarizing that case.



The defendant, Knowles, was the publisher of a paper. An unmarried woman had become pregnant and had had an abortion committed and died as a result. Knowles used that incident as an occasion to set forth in his paper for general distribution an indictment against the [29] morals of society for being so hidebound about our institution of marriage, and he advocated in the columns of his paper free relations between man and woman without the benefit of marriage.

That was an attack upon the established morals of society. He attempted to defend on the theory that that was his sincere belief and his motives were of the best. The Court properly held that the fact that a man may sincerely believe that he is doing this thing for a good purpose does not prevent an actual violation of the statute, doing of an act actually prohibited by Congress. The subjective attitude is entirely immaterial.

On the other hand the courts have also dealt with the question of the object or purpose of a document from the objective viewpoint, and at least the more modern trend—you can find a few of the older cases prior to the Swearingen case announcing a different result, but the controlling current of authority ever since the Swearingen case has been that the document is to be judged from its net or dominant effect as a whole judged by its contents and its tendency to deprave or debauch the morals of such persons into whose hands the document might fall.

But the very definition of the crime, whether or

not the addressee or the recipient of one of these documents is such a person that the document itself in his hands might tend to corrupt or deprave his morals is the ultimate question in this case. It is one of the essentials of the crime and that is where this language in the Swearingen case, which I have quoted in the brief and which I submit the government has not given full effect to, becomes so important.

“Referring to this newspaper article, . . . its language is exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.”

That is the important and controlling language. We have the Dennett case. There are many, many cases.

The Court: What were the facts in the Dennett case?

Mr. Turner: That was a case where a mother had two children, who, when they came to the inquisitive age, were naturally curious about sex. She looked through the literature and found nothing that met what she thought was the need of children such as hers. She made quite a study and wrote a pamphlet, took it to doctors, had their approval, and at first it was published by a medical journal. It was a pamphlet designed for [31] distribution to parents in order to instruct their children about

sex at the proper time. After its publication by a medical journal, the defendant took it upon herself to make her own publication and sold these pamphlets at 25c per copy. Some of the pamphlets went through the mail and the government charged her under this Statute and she was convicted below, and the Court used this language I have quoted in the brief and pointed out that the circumstances of distributing this pamphlet together with the contents of the pamphlet itself were not—we are not talking about the undisclosed motive of the writer or sender, only such motive as appears from the document itself and from the circumstance of mailing it, including the identity of the addressee.

In that *Dennett* case, as I recall it, the pamphlet had been mailed to a mother of children. It had not been mailed to the children themselves and the Court held that viewing the purpose and character of the document and the circumstance of the mailing, that was not a violation of the Statute and the conviction was reversed. I think a moment's reflection will show that that must be the law. Suppose for example that these prosecuting witnesses had not found it convenient to come in. Suppose they had lived in Snoqualmie or way [32] out on a farm and it was not convenient for them to come in and they mailed these identical letters to the United States attorney and said "What can be done about this?" Would they have been guilty of a violation of the Statute? Obviously Congress didn't mean that if the United States attorney—and the same Statute

makes the acceptance from the mail of such a document a crime—certainly Congress didn't mean that the United States attorney should be prosecuted under this Statute for receiving such documents through the mail.

Suppose Mr. Evans should desire to consult one of his superiors in Washington, D. C., and should mail this letter or a copy of it for an opinion by a United States assistant attorney general. Would he be guilty of a violation of the Statute?

Those are the things the Courts have uniformly ruled that this Statute must be given a reasonable and practical construction, and the Swearingen case controls here.

It is one of the circumstances of who is the addressee and what were the circumstances and is the document under all the circumstances calculated to corrupt the addressee's mind and morals?

The Court: Have you the Swearingen case report with you? [33]

Mr. Turner: Not the full report.

The Court: What are the facts in the case?

Mr. Turner: That was a newspaper as I recall.

The Court: That will sufficiently answer the Court's inquiry.

Mr. Turner: It was an article that attacked a certain person and used vile language about him, and some of the terms related to matters of sexual impurity, but the Court appraised the whole article as being one that was simply coarse, vulgar and disgusting.



The Court: The Court is of the opinion that under these two cases cited by the Court, the one in 28 F. and 160 F. under the detailed citation which the Court has given counsel, this objection should be sustained. That will be the order of the Court.

Mr. Turner: May I have an exception?

The Court: Allowed.

And to similar questions, if there is objection, the Court will sustain the objection.

Do you wish to make an offer of proof or anything of that sort?

Mr. Turner: I will do that now.

The Court: You may make your offer of proof.

Mr. Turner: In the first place, may I make a preliminary objection? [34]

The Court: Will you do so as briefly as you can?

Mr. Turner: Yes, Your Honor. First, that the right of cross-examination is being unduly restricted, but I am embarrassed in making an offer of proof because I have not had an opportunity to talk to the witness and to know exactly what he would testify to.

The Court: Be assured that the Court will give you a later opportunity, and if you would like to do it at the recess or end of the day's session or at any other time in the trial, the Court will give you the opportunity when you request it to frame your offer of proof, to advise yourself of the details sufficiently so that you can make a more complete and accurate record. You do not have to make your offer of proof now. The Court was giving you this opportunity, not requiring you to make it.



Mr. Turner: May I have the opportunity of talking to Mr. Fardon privately so that I may find out what he would testify to? Then I will make the offer.

The Court: You may do that.

Bring in the jury.

(Jury returns.)

The Court: All have returned to their places as before the noon recess. May the record show that to be the fact, that call of the jury is waived and that all [35] jurors are present and also all parties on trial with their counsel.

Mr. Evans: The record may so show.

The Court: Has the defendant any objection to that?

Mr. Turner: No, Your Honor.

The Court: The witness will resume the stand.

(Testimony of Milton Fardon.)

Mr. Evans: I believe the ruling of the Court on the objection to the last question should be made in the presence of the jury, Your Honor.

The Court: The objection is sustained. Ask another question.

Q. At the time you received that letter, Mr. Fardon, did you know Mrs. Thornquist?

A. Yes I did.

Q. That is the woman referred to in the letter?

A. Yes.

Q. Had you associated with her?

(Testimony of Milton Fardon.)

Mr. Evans: I am going to object to that as being immaterial to the issues in this case.

The Court: That objection is overruled.

A. Yes, I knew the girl, certainly.

Q. That is not the answer to the question. I asked you if you had associated with her?

A. Yes I had. [36]

Mr. Evans: I will object to the form of that question. The term "associated with" has many meanings. I ask counsel to be more specific as to what he means.

The Court: That objection is overruled.

Q. You had gone out with her socially, had you?

A. Yes I had.

Q. Entertained her in some fashion or other, either at meals or movies or something of the sort?

A. Yes.

Q. Would you describe very briefly the extent of your association with her at the time you had received the letter?

A. Just what do you mean by association? That is a broad statement, Mr. Turner.

Mr. Evans: I am going to object to that.

The Court: The objection is sustained. I think that is sufficient.

Mr. Turner: Your relationship with her was not a business relationship?

Mr. Evans: I am going to object to that as being immaterial.

The Witness: What do you mean by business relationship?

(Testimony of Milton Fardon.)

The Court: The objection is sustained.

Q. Upon the receipt of this letter, how long was it before you told anybody about the receipt of the letter? [37]

Mr. Evans: I am going to object to that as being immaterial, not within the scope of direct examination. It doesn't make any difference how long he had it before he told anybody about it.

The Court: What is the purpose of the inquiry?

Mr. Turner: I will reframe the question.

Q. Did you make a complaint to any representative of the post office or the district attorney about this letter? A. No I didn't.

Mr. Evans: I am going to object to that as not being material, within the issues of this case.

The Court: What is the purpose of it?

Mr. Turner: To find out how this investigation was instituted.

The Court: The objection is sustained.

Mr. Turner: If the Court please, I would like to reserve further cross-examination until after I have had the opportunity to talk to Mr. Fardon privately.

The Court: I do not see how that can be done. You will have to proceed now.

Mr. Turner: What I mean to say is that I wish to close the cross-examination now except for the offer of proof referred to.

The Court: That request is granted.

Is there any further cross-examination except

(Testimony of Milton Fardon.)

that [38] question which counsel just mentioned?

Mr. Turner: That is all.

### Redirect Examination

By Mr. Evans:

Q. Prior to today, have you ever met or seen Mr. Verner before?      A. No I hadn't.

Mr. Evans: No further questions.

Mr. Turner: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call plaintiff's next witness.

Mr. Evans: Mrs. Nelson.

### EVELYN NELSON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Evans:

Q. Will you state your full name please?

A. Mrs. Evelyn Nelson.

Q. Where do you live? [39]

A. 643 West 51st.

Q. I will ask you whether or not you have ever worked at the Ford Motor Company at 4141 Fourth Avenue South?      A. Yes sir.

Q. I will ask you whether or not you have ever received any mail there?      A. Yes sir.

Q. I will hand you what has been marked for

(Testimony of Evelyn Nelson.)

Mr. Evans: Mrs. Nelson.

Identification as Plaintiff's Exhibit 4 and 5. Referring to each of those Exhibits, I will ask you whether or not you have ever seen them before?

A. Yes.

Q. Without revealing their contents, will you state whether or not you can identify each of those Exhibits?

A. Yes sir.

Q. Referring to Exhibit 4, will you state what it is without revealing its contents?

A. It is an envelope addressed to Evelyn Nelson in care of the Ford Motor Company, Seattle.

Q. I will ask you whether or not you received that in the mail?

A. Yes.

Q. Referring to Exhibit 5, I will ask you whether or not that Exhibit was in the envelope at the time you received Exhibit 4? [40]

A. Yes sir.

Q. I will ask you whether or not there were any identifying marks on Exhibit 4 by which you may further identify that Exhibit?

A. Yes. My initials are in the corner here.

Q. And in regard to Exhibit 5, are there any identifying marks by which you may further identify that Exhibit?

A. My initials also show, in my handwriting.

Q. Will you state whose signature purports to be on Exhibit 5?

A. It is signed by Ernest Verner.

Mr. Evans: I offer Exhibits 4 and 5.

Mr. Turner: No objection.

The Court: Each of them is admitted.



(Plaintiff's Exhibits 4 and 5 received in Evidence.)

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PLAINTIFF'S EXHIBIT NO. 4

[Envelope postmarked]: Seattle, Wash., Nov. 8, 3:30 P. M., 1948.

Evelyn Nelson  
% Ford Motor Company  
4141 4th Avenue So.  
Seattle, Wn.

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PLAINTIFF'S EXHIBIT NO. 5

[Letter]

Mr. Milton Fardan

I wish to take this opportunity at this time to thank you from the bottom of my heart for taking the one and same Verne Thornquist off my hands. It was a problem I have had for many years and was unable to find a way to get rid of her, so you can see what a great favor you have accomplished in such a short while for me.

This letter is not a gripe from a rejected suit, but from one trying to give you facts and dates so you can judge for yourself, so you wont become ensnared in one of her carefully laid and planned traps as others including myself have.

Verne is a girl who will sleep with any man and is a neurotic on the question of intercourse. Any man can make her and I for one have more times than

## Plaintiff Exhibit No. 5—(Continued)

one can remember. The following places can be checked and verified where we have stayed together over week ends and holidays. I have verification of these and under what names we registered. At Spokane, Davenport Hotel. Sillman Hotel. Olson Motor Court, At Yakima, Commercial Hotel. Canyada Lodge, Western Motel. at Cle Elum, Travelers Hotel, at Vancouver Wash., Vancouver Motel, at Graylands Wash. Henry's Auto Court, this one can be verified by Mr. and Mrs. Bothwell who live in the family home and went with us on this trip over Memorial Day.

Also the times when I lived at the house it was a nightly occurrence for her to sneak into my room and get into bed with me.

Milton you are a perfectly good candidate to get involved in her scheme of things and this is how it will work. You will be pitied for having to eat out all the time, and will be asked to take your dinners there at the house and then she will spring the old one, why don't you live with us, we have plenty of room and mother sure could use the money to cut down expenses. Verne has the filthiest mind of any one I have ever come in contact with. Don't let that Church gag throw you. It has been worked on all. She did not get the nickname of HOT PANTS at the bank without some reason.

A word to the wise is sufficient and if you see fit to continue on be sure and get your share as she is fair screwing.

Plaintiff's Exhibit No. 5—(Continued)

She will stomp her feet, cry and carry on but you will find out she is a great actress. The records still stand. Dont be a sucker.

Sincerely yours,

/s/ ERNEST VERNER.

P.S. In my estimation she is lower than a common prostitute.

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(Testimony of Evelyn Nelson.)

Cross-Examination

By Mr. Turner:

Q. You have been married for some years?

A. Yes. Two years.

Q. You are living with your husband?

A. Yes sir.

Q. At the time of receiving this letter, what was your position at the Ford Motor Company?

A. I was a secretary.

Q. To whom? A. The depot manager.

Q. He is the man in charge of that department of the Ford Motor Company in this area, is he?

A. Yes sir.

Q. Was Mrs. Verne Thornquist, who was referred to in the letter, also employed in that same department?

Mr. Evans: I am going to object to that as being irrelevant, not within the scope of the direct examination, nor pertinent to the issues in this case.

(Testimony of Evelyn Nelson.)

Mr. Turner: The purpose of the question is to disclose——

Mr. Evans: I think it should be made in the absence of the jury if he is going to explain his purpose.

Mr. Turner: It is to develop, it has to do with the interest—whether or not the subject matter of the communication was a matter that could be considered to be a matter of proper interest or concern to the management of that department concerning an employee then working in that department.

In other words, it is the theory that the employer in charge of the particular department may properly take [42] cognizance of matters affecting in a substantial degree the employee of that department.

The Court: The objection is sustained.

Mr. Turner: I do not wish to transgress upon Your Honor's ruling. May I have the same right to make an offer with respect to this witness and the same opportunity to talk to her privately.

The Court: Yes.

Mr. Turner: With that exception, the cross-examination is closed.

Mr. Evans: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: This witness and the preceding witness will remain in attendance until later excused by the Court.

Mr. Evans: I would like to recall Mr. Mein at this time.

### BERNARD MEIN

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows: [43]

#### Direct Examination

By Mr. Evans:

Q. Referring to what has been marked for Identification as Plaintiff's Exhibit 1, do you have that before you?      A. I do.

Q. What was your previous testimony about who signed that statement?

A. That was signed by Ernest Verner.

Q. I will ask you who wrote the statement?

A. After talking with Mr. Verner and getting his statement, I wrote it.

Q. I will ask you whether or not Mr. Verner read it before he signed it?

A. He did read it.

Q. I will ask you whether or not the information set out in that statement was substantially the same as what Mr. Verner told you verbally?

A. It is substantially the same, and after reading it, he said that it was.

Mr. Evans: I again offer Plaintiff's Exhibit 1.

Mr. Turner: There are certain portions of that that I desire to object to, Your Honor.

The Court: Do you wish to question the witness in the voir dire?



(Testimony of Bernard Mein.)

A. Yes I do, but he has not yet closed his direct examination as I understand it.

The Court: I am giving you the opportunity to say whether or not this statement was taken under proper circumstances.

Mr. Turner: Yes I do. Mr. Mein, at the time you talked to Mr. Verner, you had previously talked to Mrs. Verner, had you not?

The Witness: Mrs. Verner had called me on the telephone and told me that she had opened a letter which I had sent to him.

Mr. Turner: In your conversation with her, she told you something of the background of this matter, did she not?

The Witness: She asked me to get in touch with you. She said you were her attorney.

Mr. Evans: I am going to object to this line of testimony. I don't see where this has anything to do with the signed statement.

The Court: The objection is sustained. You can ask him the circumstances under which he took the signed statement.

Mr. Turner: That is right. I can't do it all in the same sentence. I am trying to develop the fact that the conversation with Mrs. Verner was so closely connected in point of time as to form a part of what was said and [45] done at the time of the taking of this statement from Mr. Verner.

The Court: It is not properly a part of the voir

(Testimony of Bernard Mein.)

dire to establish whether or not this statement was legally taken. The objection is sustained.

Mr. Turner: I have no question about legality. I think I can reserve that, but I do have an objection to certain passages of this, Your Honor, if the purpose is to put the whole document in evidence.

The Court: I understand the document is offered in evidence.

Mr. Turner: It has been so offered, and there are certain passages of it that I would like to object to. I object to the last statement, the last sentence in the third paragraph of the document, Your Honor. I believe it is objectionable as being a conclusion and is not a statement of fact.

The Court: You mean the last statement made?

Mr. Turner: No, just the last sentence in the third paragraph.

The Court: Is there any response?

Mr. Evans: Yes, Your Honor. That is a matter which is to be proven, which is set out in one of the cases which we have previously referred to, the Bebout case. That is one of the elements of the offense as [46] set out in the note here. I am trying to refrain from discussing exactly—

The Court: Yes, I have in mind the issue between the parties on this matter. This objection is overruled and Plaintiff's Exhibit 1 is now admitted.

(Plaintiff's Exhibit 1 received in evidence.)

## PLAINTIFF'S EXHIBIT NO. 1

Seattle, Washington,  
December 1, 1948.

Statement of Ernest Verner:

I am 43 years of age, born November 4, 1905, living at 1007 W. 67th St., Seattle, Wash., with my wife, to whom I have been married for 22 years.

On three occasions I have started divorce proceedings, with the intention of marrying Miss Verne Thornquist, whom I have known for above five years.

Recently I learned Miss Thornquist had been associating with one Milton Fardan, employed by the Ford Motor Co., 4141 4th Ave. South, Seattle, Wash. I became quite angry and as a result wrote and mailed typewritten letters to several of the employees of the Ford Motor Co., at 4141 4th Ave. So., including Mr. Fardan, Evelyn Nelson, (In pencil: Delete by cutting) in which I made reference to Miss Thornquist's actions and behavior. I knew I should not have written this type of letters.

The letters addressed to Milton Fardan and Evelyn Nelson, postmarked at Seattle, Wash., Nov. 8, 1948, bearing my signature, have been shown to me today by Post Office Inspector Bernard Mein, and they were both written and mailed by me.

This statement is entirely voluntary on my part,

Plaintiff's Exhibit No. 1—(Continued)  
knowing that it may be used in court against me,  
and no promises of any kind have been made to me.

/s/ ERNEST VERNER.

Witnesses:

/s/ L. D. WASSON.

/s/ BERNARD MEIN.

[Endorsed]: Filed October 26, 1949.

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(Testimony of Bernard Mein.)

Mr. Evans: Since this witness typed it, I would like to have this witness read it, if I may, Your Honor, at this time.

The Court: You may do so.

Q. Will you read that exhibit to the jury, please?

A. "Seattle, Washington, December 1, 1948. Statement of Ernest Verner: I am 43 years of age, born November 4, 1905, living at 1007 W. 67th St., Seattle, Wash., with my wife, to whom I have been married for 22 years.

"On three occasions I have started divorce proceedings, with the intention of marrying Miss Verne Thornquist, whom I have known for about five years.

"Recently I learned Miss Thornquist had been associating with one Milton Fardan, employed by the Ford Motor Co., 4141 4th Ave. South, Seattle,

(Testimony of Bernard Mein.)

Wash. I became quite angry and as a result wrote and mailed typewritten letters to several of the employees of the Ford Motor Co., at 4141 4th Ave. So., including Mr. Fardan, Evelyn Nelson, Phyllis Kirkpatrick, [47] and others in which I made reference to Miss Thornquist's actions and behavior. I knew I should not have written this type of letters.

"The letters addressed to Milton Fardan and Evelyn Nelson, postmarked at Seattle, Wash., Nov. 8, 1948, bearing my signature have been shown to me today by Post Office Inspector Bernard Mein, and they were both written and mailed by me.

"This statement is entirely voluntary on my part, knowing that it may be used in court against me, and no promises of any kind have been made to me." It is signed Ernest Verner, in the presence of myself and Inspector L. D. Wasson.

Mr. Evans: No further questions.

### Cross-Examination

By Mr. Turner:

Mr. Turner: If the Court please, I overlooked one objection. I desire to have leave to make it now. I noticed in the reading of that document that certain other persons who are mentioned in it as having received letters—they are not referred to in the indictment. They refer to other transactions and I move that that part be stricken and the jury instructed to disregard it.

I move to strike out in the third paragraph, line



(Testimony of Bernard Mein.)

4, the words "several of the"; then in line 5, the word, [48] "including" and in line 5 and 6 the words "Phylis Kirkpatrick and others" on the ground that they relate to other matters and might be construed by the jury to relate to other offenses.

The Court: What have you to say, Mr. Evans?

Mr. Evans: Other similar offenses, Your Honor, may be shown. These offenses are identical and intent being an ingredient of this crime, I believe the government is entitled to show if it so desires other similar offenses, other identical offenses. I don't believe it would be proper to strike those words from this statement. This is the defendant's own statement, signed by him, given freely and voluntarily.

The Court: One of the consequences of leaving it in would be that it might open up certain rebuttal testimony. The request to strike those words "Phylis Kirkpatrick and others" is granted and those words are stricken out and the jury will disregard them.

Mr. Evans: Your Honor, I am worried about the practical aspects of——

The Court: Before the Exhibit is sent to the jury room, the clerk will in the presence of counsel, paste over those words sufficient obliterating material to cover that up.

Q. Mr. Mein, how long did this interview with Mr. [49] Verner take?

A. Well, from my recollection, I would say

(Testimony of Bernard Mein.)

about twenty or thirty minutes, probably not more than half an hour.

Q. Isn't it a fact that you talked about quite a few things, didn't you?

A. I just showed him the letters and asked him whether he had written them and he said he had.

Q. You had known Mr. Verner for quite a period of years?

A. I did not recall ever having seen him before.

Q. You would ask Mr. Verner something and you would discuss it for a while and then you would write down your own summary of what you felt that Mr. Verner had said, is that correct?

A. His words, yes.

Q. You mean to say that Mr. Verner used those exact words?

A. He said that he had written the letters, and why he had written them, and I put it down just as he told it to me, and then he read it carefully and he said "Yes, that is correct" and he also said that in the presence of Inspector Wasson before he signed it.

Q. Where was this interview taken?

A. In the post office building. [50]

Q. In your office there?

A. In my office, yes.

Q. Did you advise him that he could have his attorney present if he so desired?

A. Pardon?

(Testimony of Bernard Mein.)

Q. Did you advise him that he could have his attorney present?

A. Oh yes, and I also advised him that he did not have to make any admission or statement whatsoever, that anything he said could be used against him.

Q. You did not put that in the statement, that he did not want an attorney?

A. At this time?

The Court: In Plaintiff's Exhibit 1, is that what you refer to?

Mr. Turner: Yes.

The Witness: No, it is not in the statement.

Q. Didn't he tell you quite a little about the background of this matter, what has gone on so far as Mrs. Thornquist is concerned?

A. Only that he had known her for a short time—no, he didn't go into the background. He said he had known her for several years.

Q. Is that all he said?

A. He didn't go into details. [51]

After he read the letter—I showed him the letter. He read that and he said, yes he had written it. We didn't go into his past, no.

Q. You didn't go into that at all?

A. Except that he had known her over a period of years.

Q. And that is all he said about it, that he had known her over a period of years?

A. Yes, said that he had planned to marry her

(Testimony of Bernard Mein.)

and had brought suit for divorce against his wife for that purpose.

Q. As a matter of fact, hadn't you known him, Mr. Verner, at the time he was working in the bank, and you had gone in there as a customer of the bank?

A. He mentioned that. He had recognized my name as a customer of the bank while he was employed there but I did not at that time ever recall ever having seen him at the bank. I don't know what department he was in or whether I ever contacted him.

Q. There was also mentioned between you Mr. Pinkham, who was for many years one of the postal inspectors, whom Mr. Verner had also known?

A. Mr. Verner remarked to me that he had known me and several other inspectors who had bank accounts at the bank, and he included Inspector Pinkham's name in it, and I believe one other.

Mr. Turner: That is all. [52]

Mr. Evans: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Call plaintiff's next witness.

Mr. Evans: Mr. Wasson.

## LAMAR D. WASSON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Evans:

Q. Will you state your name, please, and spell your last name for the reporter?

A. Lamar D. W-a-s-s-o-n.

Q. Where are you employed?

A. The Post Office Department.

Q. In what capacity?

A. Post office inspector.

Q. How long have you been so employed?

A. Eight years.

Q. Do you have Exhibit 1 before you?

A. I do. [53]

Q. I will ask you whether or not you were present when Mr. Verner signed Exhibit 1?

A. I was.

Q. I will ask you whether or not he signed it freely and voluntarily?

A. Yes.

Q. I will ask you whether or not your signature appears there as a witness to his signature?

A. It does.

Q. I will ask you whether or not Mr. Mein was likewise present at this time.      A. He was.

Q. I will ask you whether or not at the time Mr.



(Testimony of Lamar D. Wasson.)

Verner signed that he acknowledged that the statements set forth in Exhibit 1 were true?

A. He did.

Mr. Evans: No further questions.

Mr. Turner: No question.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Evans: I have no further evidence to present, Your Honor. However, before I officially rest my case, I would like to have an opportunity to determine the obliteration on Exhibit 1 as to how it is to be [54] accomplished.

The Court: You may do that. The clerk may consult with counsel about the proper manner of covering that stricken material.

Mr. Evans: Counsel and I have discussed the matter and I believe it might be agreeable if with a razor blade those particular words could be cut out and pasted on a piece of paper and preserved as being the words which are deleted, if they could be so arranged on another sheet in the same general position so that they might be able to be referred to.

The Court: Is there any objection?

Mr. Turner: I think that is a very sensible suggestion.

The Court: Will counsel supervise the accomplishment of that result?

Mr. Evans: At the next recess, we can accomplish that.

The Court: That will be agreeable to the Court.

Mr. Evans: The government rests.

The Court: Do you wish to take up some matter in the absence of the jury?

Mr. Turner: Yes, Your Honor. There are several matters and I suggest that the jury be excused at this time. [55]

The Court: The jury will be excused temporarily.

(Jury retires.)

Mr. Turner: In the first place, if the Court please, I feel that before the government is allowed to rest, I should have the opportunity of discussing with these complaining witnesses—of finding out what they would testify to if I were allowed to ask the questions. It might be that in such a conference I could find out they would testify to some things that the Court would admit, that I should be allowed to make any offers prior to the government resting, because it is properly part of the government's case. I would feel embarrassed were I to inject that at a later stage of the trial.

I think the defendant is entitled to make his challenge, if any, to the government's case on the basis of the entire government's case.

The Court: The Court will give you that chance now if you wish to do that.

Mr. Evans: I have told these witnesses the same thing that I have always told other witnesses, that I have no power to either compel them to talk to opposing counsel or any power to compel them to re-

frain from it, in any regard. Perhaps the Court has that power, but I do not feel I do. I have always told my [56] witnesses that and I have told these witnesses, that it is a matter of whether they care to talk to opposing counsel.

The Court: The Court will be in recess ten minutes.

(Recess.)

Mr. Evans: The stricken words have been cut out of the original and pasted on a sheet of paper. May the piece of paper that has the stricken words on it be so labeled as to what it is and made a part of the record; that is, it will not go to the jury but in case there is any later argument in any manner, the clerk will be directed to label this as being the stricken words taken out in accordance with the Court's order from Exhibit 1.

The Court: Is there any objection?

Mr. Turner: No objection to that, Your Honor.

The Court: Let it be marked Plaintiff's Exhibit 1-A. It is not received in evidence, it is merely marked for the record to indicate what was taken out of Plaintiff's Exhibit 1.

Mr. Evans: That is correct.

(Document marked Plaintiff's Exhibit 1-A.)

The Court: Are you ready to make your offer of proof?

Mr. Turner: I want to state first that Mrs. Nelson spoke with me, was willing to answer my questions and I am prepared to make an offer of proof as to what she would testify to. May it be assumed

for the purpose of record that she is now on the stand?

The Court: Is there any objection to that?

Mr. Evans: No objection.

The Court: The Court has none. Let that assumption be made.

Mr. Turner: I offer to prove by the witness, Evelyn Nelson, that upon receipt of this letter she was shocked and disgusted and felt that the letter was insulting, and that the letter produced no other effect on her.

The Court: Is there any objection?

Mr. Evans: I would object to that proof being presented to the jury, Your Honor, as being irrelevant and immaterial and not part of the issues in this case.

The Court: The Court sustains that objection.

Mr. Turner: I further offer to prove by the witness, Evelyn Nelson, that at the time of receiving this letter, Mrs. Verne Thornquist, who is referred to in the letter in count 2, was an employee of the Ford [58] Motor Company in the same department with Mrs. Evelyn Nelson and was under the supervision and direction of the head of that department to whom Mrs. Nelson was the secretary.

The Court: Does that complete that offer?

Mr. Turner: Yes, Your Honor.

Mr. Evans: I make the same objection to that proof, that it is immaterial, has no bearing upon any of the issues involved in this case.

The Court: On that offer, I wish to call to the

attention of counsel on both sides that one paragraph of Exhibit 1 has the following statement: "Recently I learned Mrs. Thornquist had been associating with one Milton Fardon, employed by the Ford Motor Company. I became quite angry and as a result wrote and mailed typewritten letters to several of the employees of the Ford Motor Company, including Mr. Fardon and Evelyn Nelson."

The testimony may be further explanatory of that, and the plaintiff has seen fit to offer this exhibit in evidence by that reference to the Ford Motor Company and the employment of Mrs. Thornquist. The objection is overruled, and I hold that counsel making the offer is entitled to produce that evidence encompassed in this offer before this jury.

Mr. Turner: I assume that when the jury is recalled [59] Mrs. Nelson will be recalled to the stand and I will be allowed to ask that question.

The Court: You may.

Mr. Turner: Should I complete my other offers?

The Court: Yes.

Mr. Turner: I further offer to prove by the witness, Evelyn Nelson, that she did not make a complaint to the federal authorities, to the post office or the United States attorney spontaneously, but that she did in response to instructions from someone—just who I have been unable to find out,—call that to the attention of the authorities and answer their questions relating to it.

The Court: Is there any objection to this offer?

Mr. Evans: I object to that offer as being abso-



lutely irrelevant and immaterial, how or by what means the government officials gained knowledge of this. I can't see where it has any bearing on this case, as to whether or not this witness spontaneously went right down to the postal inspectors. It has no bearing upon the issues of this case whatever.

The Court: Do you wish to state your theory of admissibility?

Mr. Turner: I think it has some evidentiary value as bearing upon the effect of the letter upon the addressee. [60]

The Court: The objection to the offer is sustained.

Mr. Turner: May I have an exception to the ruling of the Court excluding the several offers and each of them?

The Court: The exception is allowed.

Mr. Turner: With respect to the witness, Milton Fardon, he refused to have any conversation with me other than to state that anything that passed between him and myself should be only when he was on the witness stand, and I was unable to obtain any information from him at all as to what he might testify if I asked, and I desire leave to call him to the stand in the absence of the jury in order to ask these questions in order to make the offer of the proof as to what his answers will be.

The Court: You may do that. The Court wishes the record to show that the government's case in chief is opened up for the purpose now and the other purpose of the offers which were made, and

the Court rules the government's case in chief will be opened up during these recess proceedings in the absence of the jury and will be opened up during the time when the Court may permit counsel to produce in the presence of the jury the offered proof to which the Court consents and approves counsel doing. [61]

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### MILTON FARDON

recalled as a witness, having been previously duly sworn, was examined and testified as follows:

#### Cross-Examination

By Mr. Turner:

Q. When you received this letter, what effect did it produce on you?

Mr. Evans: I am going to object to that type of questioning for the same reason as stated before, the effect upon the recipient is not an issue in this case.

The Court: The Court sustains the objection upon the authority of those two cases which I have previously cited, the one in 28 F. and the one in 160 F.

Mr. Turner: If the Court please, it was my understanding that the Court would allow me to call Mr. Fardon to the stand for the purpose of finding out. I can't know what his answer will be unless he is allowed to answer for the purpose of enabling me to make an offer of proof. I am not asking that it go in evidence at this time.

(Testimony of Milton Fardon.)

The Court: For the purpose of advising counsel what proof will be available for his offer, the Court permits counsel to make the inquiry and will postpone [62] the ruling on the offer until the offer is made. This is, as I understand it, an investigation to see what he will have available for offering. You may answer the question.

The Witness: I don't know—I was deepy surprised, deeply puzzled, perplexed, at receiving a letter from a man whom I had never seen in my life.

Q. It had no other effect on you?

A. Yes, it did have an effect. As a matter of fact, I thought it was pretty crude of a man to write that kind of a letter about any woman, regardless of the justification, circumstances or anything else, a very poor specimen of a man.

Q. Did it have any other effect?

A. Well, we could go on and on with this. A man who could write a letter like that could be—oh, I guess, subjected to a very lengthy criticism.

Q. So far as you are concerned, you have expressed it—in other words, you thought that you were surprised and puzzled and you felt that it wasn't the sort of letter that a man should write?

A. Definitely not.

Q. And that about summarizes the effect that it had upon you?      A. In a way, yes. [63]

Q. And it had no other effect or different effect?

A. I just don't quite clearly understand that question.

(Testimony of Milton Fardon.)

Q. If it produced any other effect upon you, I want to know what it was.

A. Generally speaking, no.

Q. Did you on your own volition make complaint about receipt of this letter?

A. No, I didn't, not spontaneously. If I remember correctly, Mr. Mein had called or visited the Ford plant and left a message for me to call him.

Q. And you told the government about it only in response to Mr. Mein's call?      A. Yes.

Mr. Turner: That is all. Now if Your Honor please, I want to prove by the witness now on the stand that he would testify in front of the jury as he has now testified in Your Honor's presence in the absence of the jury. Your Honor will understand that I am simply trying to save time in making my offer. If the offer is not clear, I will try to repeat it in full but I think Your Honor knows the substance of my offer.

The Court: I understand it if you are satisfied with the record, Mr. Turner.

Mr. Turner: Yes, Your Honor.

Mr. Evans: The entire testimony that has been offered is objected to as being irrelevant and immaterial, not within the issues of this case, serves no useful purpose whatever.

The Court: Upon the same authority as that stated by the Court a moment ago in sustaining an objection to an offer of proof, the Court does now sustain this objection to this offer of proof.

(Testimony of Milton Fardon.)

Mr. Turner: May I have an exception to the Court's ruling?

The Court: Allowed.

Mr. Turner: I am sorry to say I am not quite clear on the ruling of the Court made when the jury was in Court on the extent of my inquiry into Mr. Fardon's previous association with Mrs. Thornquist as of the time of receiving the letter.

The Court: Do you mean with reference to business association in the Ford plant? Is that what you speak of now or something else?

Mr. Turner: I had asked the question as I remember, "your association wasn't a business association?" and an objection was sustained to that.

The Court: By that question, did you expect to prove their association was something of a personal or social nature?

Mr. Turner: Yes, Your Honor. [65]

The Court: You do not expect to establish that they were employed together at the same plant and that the business interest was in any way involved in any of these matters?

Mr. Turner: No, I was trying to get the negative. It was my understanding that was the fact.

The Court: The negative of that fact is not opened up by anything that has been brought forward in the plaintiff's case. The affirmative of that fact; namely, that there may have been some relationship in the business of the Ford Motor Com-



(Testimony of Milton Fardon.)

pany at 4141 Fourth Avenue South, Seattle, has been opened up. That issue has been opened up by this Plaintiff's Exhibit 1, but the negative of that has not been so opened up and I do not see any materiality of it.

As a matter of fact, had not the plaintiff opened up the question of business relationship between certain of these witnesses, and in connection with the sending of this alleged obscene matter through the mail, the Court would not permit the cross-examination to show any fact concerning business relationships. It is Plaintiff's Exhibit I which has caused the Court to rule differently on one of your offers of proof and overruled the objection thereto.

Mr. Turner: The language that I had in mind in [66] Plaintiff's Exhibit 1 was "recently I learned Mrs. Thornquist had been associating with one Milton Fardon." I submit that this defendant is entitled to inquire into the nature of that, it having been offered by the government.

The Court: The last time I spoke of the exhibit, I was not aware the exhibit said anything about that. Now the Court is reminded that the exhibit introduced by the plaintiff does disclose something of that nature and I hold you are entitled to cross examine the same.

Mr. Evans: The direct examination didn't touch upon that, Your Honor.

(Testimony of Milton Fardon.)

The Court: This witness is the one who would know about that.

Mr. Evans: He is entitled to call him as his own witness, but I do not think he has the right to cross-examine him on that subject.

Mr. Turner: This is part of the government's case, Your Honor.

The Court: In the interest of time consumption, I am going to let this question be asked of this witness before the jury.

Mr. Turner: Then there is no point in going into it right now. [67]

The Court: No, but anything that is touched upon in that exhibit of the nature you last described, the Court is going to permit you to inquire of this witness while he is on the stand.

Mr. Turner: Then I think that concludes my offer of proof.

Mr. Evans: For the purpose of the record, may I have an exception?

The Court: Allowed.

Bring in the Jury.

(Jury returns.)

The Court: Let the record show all jurors have returned to their places as before.

Mr. Evans: It is so agreed.

Mr. Turner: Yes, Your Honor.

The Court: The government's case in chief is opened up for the purpose of further cross-examination in this connection.

(Testimony of Milton Fardon.)

Q. Mr. Fardon, what was the extent of your association with Mrs. Thornquist up to the time you had received the letter which is Exhibit 2 and 3?

A. Oh, I had gone to dinner with her a couple of times.

Q. You had been out to dinner with her?

A. A couple of times. [68]

Q. I didn't hear you.

A. I said I had been out to dinner with her a couple of times, once at her home and I took her out to dinner once.

Q. Is that all the association you had had with her up to that time?      A. Yes that is all.

Q. Over what period of time had that association continued?      A. I don't know off hand.

Q. Can you give the approximate time?

A. A month or two I guess.

Q. When did you first meet her?

A. When I started to work at the Ford Motor Company.

Q. When was that?

A. About a year and a half or a year ago.

Q. That would be July of 1948?

A. Oh no, it was before that—no, it was about February of 1948. February or March. Then I knew her only passing by, I didn't know her to speak to.

Q. You first started associating with her a month or so before you got the letter, and that was sometime in November?

(Testimony of Milton Fardon.)

A. Listen, counsel, I just don't like that word, associating. It has a very broad—it doesn't sound—[69] what do you mean by association?

Q. You can tell what you mean when you answer the question.

A. No, I want to know what you mean.

Mr. Evans: I object to the form of the question unless counsel defines what he means by association.

The Court: The objection is sustained. Have in mind what the witness said or tried to describe as the nature of his acquaintance, the length of it rather than the word, association.

Q. Your relationship or acquaintance with Mrs. Thornquist, so far as it was a social acquaintance and relationship, had existed you say for a month or so prior to November, 1948?

A. Yes—no, no not prior to. I worked there at the Ford Motor Company for about ten months and Mrs. Thornquist was more or less an acquaintance like any of the other women who worked there, no more than, just say "Good morning," or "Good afternoon" or "Good night."

Q. Did you take her out to the theater?

A. No.

Q. You took her to dinner? A. Yes.

Q. You had dinner at her home once?

A. Once, yes. [70]

Q. About when was that?

A. I can't remember that, it is so long ago.

(Testimony of Milton Fardon.)

Mr. Evans. I object to that. He is going into the nature of the relationship, that it was a social relationship, not a business relationship. I believe that was the limit which was placed upon his right to cross-examine.

The Court: The objection is overruled with this proviso: that if the witness can state it now as nearly as he can, this should end the inquiry on that particular detail.

Mr. Turner: I am just trying to get a definite answer. It is a little bit vague.

The Court: If you recall, will you give the information needed to answer that question?

The Witness: No, I can't recall the exact time, Your Honor.

The Court: Ask him another question.

Mr. Turner: That is all.

Mr. Evans: No further questions.

The Court: You may step down.

Mr. Evans: I would like to ask if this witness may be permanently excused at this time.

The Court: Is there any objection?

Mr. Turner: It might be that it would be necessary [71] to recall him for a further purpose. As matters now stand, I cannot say with any assurance that he will be necessary, but I cannot foretell what will happen.

The Court: The Court directs the witness, Fardon, to remain in attendance until he is later excused by the Court.



Mr. Turner: Mrs. Nelson.

The Court: Recall Mrs. Nelson.

EVELYN NELSON

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows:

Cross-Examination

By Mr. Turner:

Q. Mrs. Nelson, at the time you received the letter which has been identified as Exhibits 4 and 5, Mrs. Thornquist was an employee of the Ford Motor Company in the same department in which you worked, was she? A. Yes. .

Q. And she was under the supervision and direction of the head of that department?

A. Yes. [72]

Q. And you were the secretary to the head of that department, is that correct?

A. Yes. However, I might add this—

Mr. Evans: Just a moment. Don't volunteer any information, it might not be admissible.

Q. How long had Mrs. Thornquist been employed in that capacity in that department prior to the time you received the letter, Exhibits 4 and 5?

A. Since July, 1947, I believe.

Q. For more than a year? A. Yes sir.

Mr. Turner: That is all.

(Testimony of Evelyn Nelson.)

Mr. Evans: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: Is there any further evidence?

Mr. Evans: The government again rests.

The Court: The plaintiff rests.

Mr. Turner: If the Court please, I have an argument to make now on the basis of the admission of these documents, with reference to these exclusions of evidence. I feel that as the case now stands, these offers of proof would be admissible. I don't want to go into the substance of the argument in the presence of the jury unless the Court directs, but I feel that [73] rule which the government has relied on in making the objections to my offers of evidence is in substance that the background has no bearing on the charge.

The Court: Unless there is something different or a different authority, I prefer to ask you to—

Mr. Turner: I want Your Honor to appreciate my point. I feel that the government has opened up that background by offering in evidence Exhibit 1, which goes into the background and circumstances—I don't want to refer to the details of it, but the point is that the government has selected certain background and circumstances surrounding the mailing of these letters and they have put that part in, but they want to exclude the balance of the surrounding circumstances that bear on the defendant's case. I think the entire circumstances

should be allowed in, and when the government offers witnesses to detail part of these circumstances, I am entitled to cross-examine to bring out the balance, and in view of the fact that at the time Your Honor made these rulings of exclusion, this document had not yet been admitted in evidence, I think the case is now in a different condition. The government has opened the matter up and in fairness, we are entitled to offer the other side, the balance of the circumstances.

The Court: The jury will temporarily retire.  
(Jury retires.)

The Court: What issue does Plaintiff's Exhibit 1 offer that has been covered by the direct examination or by the exhibit as to which you have not already been accorded the right of cross examination?

Mr. Turner: I asked Mr. Mein a question on cross-examination, if before he talked to Mr. Verner he had not had a conversation with Mrs. Verner in which he received mention of this background and an objection was sustained to that.

The Court: That is not covered in this.

Mr. Turner: Yes, Your Honor, in the second paragraph and the first paragraph. It starts right out that he was married and living with his wife, had been married for 22 years and on three occasions had started divorce proceedings with the intention of marrying Mrs. Verne Thornquist whom he had known for about five years.

I wanted to ask him if Mrs. Verner hadn't told

him some of that very background on the telephone, and that was so intimately connected in point of time with the statement which he took from this defendant that he knew it at the time he took this statement, that it was a different version of this background that he had incorporated in this confession. [75]

He puts his own construction of the language in there, but it is a part only, and there were other matters that Mr. Mein knew at that time, and he was the one whose language is contained in this exhibit. I wanted a chance to cross-examine him about that. That is one of the things.

The Court: What else is there?

Mr. Turner: So far as this exhibit is concerned I can only say this generally, I think the exhibit opens up the entire background and circumstances that preceded and surrounded the mailing of the letters charged.

The Court: I would be glad to consider any words or sentences in the statement which is plaintiff's Exhibit 1 which you think bear you out in that.

Mr. Turner: It is the first three paragraphs.

The Court: Of the first two paragraphs, you have already cross-examined everybody, have you not, as to the Ford Motor Company's relationship? Do you wish to cross-examine Mr. Mein about the business relationship at the Ford Motor plant?

Mr. Turner: No, your Honor, about what he

was told at the time of his interview with Mr. Verner, about the background and relationship between Mr. Verner and Mrs. Thornquist. [76]

The Court: I am asking you now if there are any other statements in any paragraph below the second paragraph as to which you have not sufficiently cross-examined Mr. Mein. As I understand it, you have already cross-examined Mrs. Nelson and Mr. Fardon relating to paragraphs 3.

Mr. Turner: I would answer that I see no other.

The Court: Mr. Evans, what have you to say with respect to the request to cross-examine Mr. Mein on paragraphs 1 and 2 of this statement, Plaintiff's Exhibit 1?

Mr. Evans: The material issues which the government is required to prove here and the only issues involved are whether or not this defendant mailed these letters and whether or not he knew he shouldn't have mailed them, it was against the law, and whether or not they are lewd, lascivious and filthy. Those are the only issues involved here. I see no reason for bringing in any other issues to try to confuse the jury. Obviously that is all counsel wants to do, to confuse the jury. The jury shouldn't have to sit here and listen to a great deal of extraneous matters that have no bearing on this case.

It makes no difference what the relationship of any of these parties was to each other in the past. It is an offense to mail this type of communication and as in the 160 F. case, if someone wants to



transmit this type of communication, he is going to have to do it by some other means than by the mail. The only issues in this case are whether or not it was mailed by this defendant, whether or not he knew it was wrong to do it, and whether or not it was actually lewd, lascivious and filthy. I see no reason for bringing in anything else for the jury to consider.

The Court: I am inclined to think that since this exhibit was not in at the time the Court sustained the previous objection to inquiring about paragraph 1 and 2, he should have an opportunity to cross-examine Mr. Mein about it after the exhibit is admitted, and that will be done, but it is possible after this is done and after the government's case is opened up for that purpose that later on after the plaintiff rests and the defendant accedes to the resting of the plaintiff's case in chief, that this defendant may wish to make a motion in the absence of the jury.

Mr. Turner: Yes, your Honor.

The Court: Is it possible for the defendant to save the jury's and the Court's time and make that motion now?

Mr. Turner: I will be glad to cooperate. [78]

The Court: You may tell the Court now what you offered to prove on this cross-examination of Mr. Mein respecting paragraphs 1 and 2 of this statement, if you wish to do so, if you feel that will have any bearing upon the plaintiff's right and the propriety of the Court's ruling on the ques-

tion of whether or not the plaintiff will have a right notwithstanding your cross-examination on those two paragraphs to have this case in its present status submitted to the jury, supposing no other evidence should be submitted to the jury, if it is agreeable to the defendant.

Mr. Turner: If your Honor please, that is agreeable to me and I am glad to cooperate.

So far as the further cross-examination of Mr. Mein is concerned, I do not have any reason to suppose that anything would be elicited to affect the sufficiency of the evidence, but so far as the matter of the effect upon these witnesses in my offers of proof as to the effect of receiving the letter upon Mr. Fardon and Mrs. Nelson, my theory is that I should have the benefit of that.

The Court: I am going to let you cross-examine the witness, Mein. I wonder if you will be able to save any time.

Mr. Turner: With that understanding, I challenge [79] the sufficiency of the evidence for the government and move for a directed verdict of acquittal on the ground that no offense has been proved, that the cases submitted to your Honor show that there must be in order to violate the Statute a mailing of a document which under the circumstances is calculated to deprave and corrupt the morals of the addressee, and that the evidence is not sufficient to show that or to warrant the jury in coming to that conclusion beyond a reasonable doubt.

The Court: I wish counsel to know that if he wishes, the Court will deem this motion made at the close of all the government's case in chief, when the government has finally rested its case in chief, and I also wish to advise counsel now that unless the Court's opinion is changed by this further cross-examination of the witness, Mein, that the Court will probably overrule this motion and challenge and deny the motion.

The ruling is reserved until that time, until after the case in chief of the government is finally rested and at that time I will give you an opportunity to say for the record that you wish the Court to rule upon your pending motion, if you will. In that way the matter can be disposed of.

Mr. Turner: As far as the defendant is concerned, there is no objection to putting that direction in the [80] record right now and consider this the ruling.

The Court: I will reserve ruling.

Mr. Turner: I want the Court to know that I am prepared to argue that. I presume the Court would like to save time since the question could be presented later.

The Court: I am positive that in the view I have of the evidence, the Court should permit the plaintiff to go to the jury on the evidence the plaintiff has adduced, assuming as the Court must at this stage or at the stage when the plaintiff rests that there is no other evidence in the case. Do you understand that?

Mr. Turner, Yes, your Honor.

Mr. Evans: On counsel's own statement, he expects to elicit nothing from Mr. Mein to affect the sufficiency of the evidence. The government has rested twice. I see no reason why the government should have its case kept open while he puts on his defense.

The Court: I think we are all taking up unnecessary time. I do not understand that Mr. Turner meant literally those words. I realize that one might argue that that might be the effect of the words. I think what he really meant was that while the evidence was important to his side of the case, he did not believe it would affect the plaintiff's right to go to the jury [81] at the close of the plaintiff's case in chief, but he probably had the idea, as I understood him, even though he did not perhaps express it as fully as you may think he should have, that he would argue to the jury that this evidence had some bearing upon the guilt or innocence of the defendant.

Mr. Evans: If that is a matter of the defense, he has every right in the world to present it on his part of the case.

The Court: The Court will permit the request of the defendant to open up the government's case in chief for the purpose of this further cross-examination of the witness, Mein. Bring in the jury.

(Jury returns.)

The Court: All the jurors have returned to their places as before. The government's case in chief

is opened up for the purpose of further cross-examination of the witness, Bernard Mein. He will resume the stand.

BERNARD MEIN

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows: [82]

Cross-Examination

By Mr. Turner:

Q. When Mrs. Verner called you in response to the letter that you had mailed to Mr. Verner, this was approximately some time in November of 1948, was it, or when was it?

A. It was in November, 1948, yes, about November 25th, I believe, it was probably November 25th or 26th.

Q. You had not at that time talked to Mr. Verner?

A. No, I wrote him a letter to call at my office.

Q. How long after Mrs. Verner called you did you talk to Mr. Verner?

A. She said she would show him my letter and ask him to come down, so I presume it was a day or two later.

Q. You are presuming, do you know?

A. It was probably two days later.

Q. That is just an estimate?

A. One or two days later, yes.



(Testimony of Bernard Mein.)

Q. It was substantially at the same time, wasn't it?

A. Well, it was sometime later.

Q. Within possibly a day or so?

A. Within a day or two after she called me.

Q. At the time Mrs. Verner called you, she told you something about the background of this case, didn't she? [83]

Mr. Evans: I am going to object to any testimony by this witness in regard to anything Mrs. Verner may have told him unless it was in the presence of the defendant. What this is is an obvious attempt to get the testimony of Mrs. Verner on without subjecting her to cross-examination.

The Court: The objection is overruled to the present question. It may be renewed if counsel is so advised upon later questions.

A. I don't recall that she did. I was just trying to get in touch with Mr. Verner. She said when he came home she would show him the letter.

Q. Is that all that was said?

Mr. Evans: I am going to object to anything more that was said.

The Court: The objection is sustained as to what she said.

Mr. Turner: The witness has gone ahead spontaneously and related part of what was said.

The Court: You had a right to object to the spontaneous statement.

Mr. Turner: I move that that be stricken.

The Court: It is stricken. The jury will dis-

(Testimony of Bernard Mein.)

regard it, with respect to what Mrs. Verner said.

Q. Didn't she tell you anything about the previous [84] relationship between Mr. Verner and Mrs. Thornquist?

Mr. Evans: I am going to object to that. It is immaterial as to whether she told him anything or not, and what she did tell him wouldn't be admissible anyway.

The Court: The objection is sustained.

Mr. Turner: That is all.

Mr. Evans: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Evans: The government rests.

The Court: Is there anything further?

Mr. Turner: May it be understood that the motion and ruling previously made——

The Court: The government now rests and the Court deems as now made the motion and challenge which has been previously noted and the Court does overrule the challenge and deny the motion.

The defendant may now proceed.

(Opening statement made on behalf of defendant.)

The Court: Call defendant's first witness.

Mr. Turner: Mr. Gardner. [85]

## HARRY E. GARDNER

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Turner:

Q. Will you state your name, please?

A. Harry E. Gardner.

Q. What is your occupation? A. Minister.

Q. Where do you reside?

A. Sumner, Washington.

Q. You are the pastor of a church there?

A. Yes, sir.

Q. Do you know the defendant, Mr. Ernest Verner?  
A. Yes, sir, for seven years.

Q. At the time you first became acquainted with him, in what connection was it?

A. He was Sunday School treasurer, handled some five or six hundred dollars for them, doing it effectively, regularly, faithfully.

Q. At that time, were you the pastor of the church at which Mr. Verner attended? [86]

A. Yes, Trinity Methodist Church.

Q. That was here in Seattle? A. Yes, sir.

Q. Where is it?

A. West 65th Street and 23rd Avenue North West.

Q. Of course you knew Mrs. Verner, too?

A. Yes, Mrs. Verner, her family and sister and their family and Mr. Verner's mother.

(Testimony of Harry E. Gardner.)

Q. Will you state whether or not Mr. Verner was an active member of that church?

A. Yes, very much so.

Q. Did you have relatively much or little occasion to see him and to know him?

A. Oh, at least once a week, frequently twice.

Q. Do you have an opinion as to whether or not he was a man of good moral habits?

Mr. Evans: I am going to object to that as to the word "was." I think the pertinent issue—I presume this is a character witness—is what he is now.

Mr. Turner: The pertinent question is at the time of the witness's knowledge. I will withdraw that question now and ask another preliminary question.

The Court: You may do that.

Q. During what years were you the pastor of Trinity Methodist Church? [87]

A. From seven to four years ago, it is three years ago for a period of four years.

Q. From about 1942 to 1946?

A. That is right.

Q. During that period and subsequent to that time, have you had occasion to see very much of him or to know very much about him?

A. Since that period of four years?

Q. Yes.

A. Not so much, of course, not a great deal.

Q. During that period of time when you were

(Testimony of Harry E. Gardner.)

pastor at the church, did you have an opinion as to his moral character?

A. Yes, I did, on the basis——

Q. Will you state what that opinion was?

A. I considered it of the very finest kind. His mother is a good old German woman that brought up a family in strictness, in the finest way, and he had followed in those——

Mr. Evans: I am going to object to this testimony in regard to his mother.

The Court: The objection is sustained. Confine the questions and answers to the defendant.

The Witness: Thank you. My relationship with Mr. Verner was always that he was dependable, that he [88] was just A-1 I guess you would say. He was such that I felt very much—very confident of him in every respect.

Q. Was that true of the entire period in which you were pastor there?

A. I am glad for that question, because——

The Court: Do not make any further comment. Just answer the question directly. Read the question.

(Last question read by reporter.)

The Witness: No.

Q. Will you explain just how your opinion changed of him as based upon your knowledge of him, changed during the period of time when you were pastor of Trinity Methodist Church?

A. When he began to become irregular, when



(Testimony of Harry E. Gardner.)

he began to have some night duties or activities or interests, whatever that may have been, that led to irregularity; and the period of the second summer I think or the third, when he was acting as treasurer for the race track through the summer period or fall period, taking him away from his active duties, although he continued his work for some time under those circumstances and did it well.

Q. Did you have occasion as pastor of that church to find out the cause of this irregularity on the part of Mr. Verner? [89]

A. I did.

Q. What was it?

A. Interest in a woman, or a woman's interest in him.

Q. Do you know the name of that woman?

A. I have heard it again and again. I have never known it personally.

Mr. Evans: I am going to object to this line of testimony. As I understand it, this witness is called as a character witness. I believe he can testify as to character but I don't believe what he is going into now——

The Court: What is the theory of admissibility?

Mr. Turner: The theory of admissibility bears on the background and circumstances of why he sent the letter. The government has put in evidence a statement which in paragraph 2 bears on

(Testimony of Harry E. Gardner.)

this very matter I am now asking about. I am trying to give the rest of the circumstances.

The Court: How do you avoid the hearsay rule?

Mr. Turner: Well, I will concede that if there were no other evidence that there was a relationship between the defendant and Mrs. Thornquist, this would be subject to being stricken, but so far as this witness is concerned, I think that he is entitled to fix the time of the change in Mr. Verner's character [90] and habits with reference to the time he ascertained from his investigations as pastor of his church about the Thornquist matter.

The Court: The objection is sustained. Ask him another question.

Q. Did you ever speak to Mr. Verner about any association with Mrs. Verne Thornquist?

Mr. Evans: I am going to object to that as being irrelevant.

The Court: Sustained.

Q. Did you say whether or not Mrs. Verner ever brought that problem to you as pastor of the church?

Mr. Evans: I am going to object to that. Any conversation between this witness and Mrs. Verner would not be admissible.

The Court: Sustained.

Q. Prior to the time when he became involved with Mrs. Thornquist, would you state whether or not in your opinion he was a law abiding citizen?

A. Very much so. If I may volunteer a state-

(Testimony of Harry E. Gardner.)

ment, that is definitely on him, I wrote him a letter at the very worst time of this period under my ministry.

Mr. Evans: I am going to object to this voluntary statement.

The Court: The objection is sustained. [91]

Mr. Evans: And I ask that it be stricken.

The Court: There is nothing in it except that he wrote him a letter. The request that it be stricken is denied.

The Witness: If the Court would——

The Court: There is nothing before the Court. Proceed by question and answer.

Q. Do you know the reputation of Mr. Verner for truth and veracity?

A. I would think it is far above the average.

Mr. Turner: That is all except for certain offers of proof. Should I make them now or later?

The Court: Later. Is there any cross-examination?

Mr. Evans: No cross-examination.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Turner: May Mr. Gardner be excused?

Mr. Evans: No objection.

Mr. Turner: I would like to reserve the right to recall him in case the Court should consider that that evidence——

The Court: You may do that.

Mr. Turner: Mrs. Verner. [92]

## MARGARET VERNER

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Turner:

Q. Will you state your name please?

A. Margaret Verner.

Q. You are the wife of the defendant in this case?

A. I am.

Q. When and where were you married to Mr. Verner?

A. We were married August 20, 1926, in Everett, Washington.

Q. You are now living on 67th Street West?

A. West 67th, yes sir.

Q. You have lived there for quite a number of years?

A. A great many years, yes, some years before I was married even.

Q. Was there any trouble in your married life prior to the time Mrs. Thornquist entered into it?

A. Never.

Mr. Evans: I am going to object to this as being highly irrelevant. It has nothing to do with the issues in this case. Trouble between this defendant and his wife is not the subject of this lawsuit.

The Court: Mr. Turner, would you indicate what you expect to establish?

Mr. Turner: It bears on paragraph 2 of Plain-

(Testimony of Margaret Verner.)

tiff's Exhibit 1, if Your Honor please and also on Exhibit 3. This question has not reached paragraph 3 of Exhibit 1 but there is a certain statement that Mr. Mein put into Government's Exhibit 1 in paragraph 3 that we dispute on the facts and I desire to establish the facts, but again I will have to lead up to that part.

The Court: The objection is overruled.

Mr. Evans: May I address the Court on that subject?

The Court: You may do so.

Mr. Evans: If counsel had any objection to the second paragraph of Plaintiff's Exhibit 1, he had ample opportunity to make objection to it at the time it was introduced. Those are only incidental matters which are normally placed in a statement primarily to show that they were not written by someone else, to show that actually it was the person who signed the statement that actually signed it.

The pertinent issues in this lawsuit are not whether or not a divorce was ever started between this defendant and his wife. The only issues involved are whether or not he mailed these letters, whether or not [94] they were lewd, lascivious and filthy and whether or not he knew they were of such character at the time he mailed them.

Those are the only issues the Statute provides the government must prove, and all those other extraneous matters have no bearing on this case. don't think the jury should have to listen to them.



(Testimony of Margaret Verner.)

The Court: The objection is overruled. Be direct and to the point.

Q. Do you understand the question?

A. You asked me if there had ever been trouble between me and my husband before Mrs. Thornquist——

Q. That is right.

A. There never had been.

Q. When did Mrs. Thornquist first become involved in the married life of you and Mr. Verner?

A. When she started working with him.

Q. Where was that?

A. At the National Bank of Commerce.

Q. Did Mr. Verner at that time have a position with the National Bank of Commerce?

A. Yes he did.

Q. What was his position?

A. I don't know exactly what his title was. He was in the bond cage, I think, where they sold government bonds. [95]

Q. You haven't given the year when that happened.

A. I don't remember the exact year. It was before the end of the war.

Q. At any time did Mrs. Thornquist make any statement to you as to what her intentions were with respect to Mr. Verner?      A. Yes.

Mr. Evans: That is objected to as being hearsay, has no bearing on this case.

The Court: Sustained.

(Testimony of Margaret Verner.)

Mr. Turner: If the Court please, that is a very material point and I would like to be heard about it.

The Court: I will hear you in the absence of the jury at the next call of the recess, but not now. The objection is sustained. I will hear you later. The witness will be available in case the Court reverses its ruling.

Q. What did you observe with reference to your husband and Mrs. Thornquist from the time she went to work in the same cage or department with him at the bank—by the way, could you give an approximate year when that occurred?

A. I would say 1944 or 1945. I am not sure.

Q. It is somewhere in there?

A. I never keep track of dates.

Q. Then what did you observe? [96]

A. Well, at first he started working late and coming home and neglecting the yard, and he had to work Sundays, and when he didn't call me—he used to call me every day to tell me what time he would be home for dinner. Finally, Mrs. Thornquist began answering the phone, wouldn't let me talk to him, said she was going to take him from me.

Mr. Evans: I object to that line of testimony.

The Court: The objection is sustained.

Mr. Turner: To how much, Your Honor?

The Court: The objection is sustained as to what she said.

Q. Did you observe anything in the way of gifts or letters that he brought home?           A. Yes.

(Testimony of Margaret Verner.)

Mr. Evans: I object to this line of testimony. This doesn't refer to anything that is in Exhibit 1.

The Court: What statement in Exhibit 1 is this question referring to?

Mr. Turner: Paragraph 2, Your Honor, and also paragraph 3. Those two paragraphs are couched in language to cast the very plain inference that Mr. Verner was the aggressor in that illicit relationship, and the fact of the matter is just the reverse. In drawing that up, Mr. Mein has so written it that it looks like Mr. Verner tried to carry on that affair and [97] was unsuccessful and became angry and so did this thing, and it is just the opposite of the truth. We are entitled to show those facts, the government having injected it.

The Court: You may ask her concerning the fact involved, without asking what was said by the person or any persons not now present.

Mrs. Evans: May I be heard further on this?

The Court: I will hear you further at the recess. You may proceed.

Q. The question called for any letters or gifts or things he brought home emanating from Mrs. Thornquist?

A. It started with boxes of home made fudge and angel food cakes and progressed to ties and shirts and things in which he would be very much embarrassed about bringing home, and he would say, "This isn't my taste. I don't know what made me buy it."

(Testimony of Margaret Verner.)

Q. Were there any letters brought home?

A. Yes letters every place, and very sentimental cards.

Q. Did you examine them?

A. Some of them, yes.

Q. Will you state the general character of them as to whether they were business letters, love letters or what they were?

Mr. Evans: That is objected to. [98]

The Court: Sustained.

Q. At any time, did your husband leave home?

A. New Year's Eve, 1946.

Q. At that time did Mrs. Thornquist call at your home and make any demands?

Mr. Evans: I am going to object to this as being hearsay.

The Court: It is sustained.

Mr. Turner: If Your Honor please, I hadn't finished my question. I am not asking for hearsay testimony, Your Honor. I wanted to ask whether or not she had made a certain demand or request. It is not a statement of fact.

Mr. Evans: What difference does it make whether counsel or the witness testifies.

The Court: The objection is sustained.

Q. About when was it that Mr. Verner left?

A. New Year's Eve, 1946.

Q. Would that mean December 31, 1946 or December 31, 1945?

A. 1945, I guess, the 31st of December.

(Testimony of Margaret Verner.)

Q. Was any action for divorce instituted against you by him? Were you served with papers?

A. I was served with papers.

Q. Will you state whether or not you defended that action? [99]

A. I did. I got you to contest it in case it was necessary but it wasn't.

Q. It was ultimately dismissed?

A. It was.

Q. State whether or not Mr. Verner came back home to live with you.

A. Some time before, yes.

Q. Some time before what?

A. Some time before it was dismissed.

Q. He was gone about six months or so, was he?

A. Less than that.

Q. Did you observe any actions by Mrs. Thornquist? A. Yes, she said she wouldn't have it.

Mr. Evans: I am going to object to anything she said.

The Court: The objection is sustained.

Q. The question was for actions.

A. She tried to break in the house. She attacked me at my front door. She tried to wreck our car when we were both in it. She would park out on the corner and watch the house. She stood in our back yard under the window and peeked through the window.

Mr. Evans: I object to this line of testimony as being irrelevant and immaterial. If counsel wants



(Testimony of Margaret Verner.)

to put in evidence that the defendant did not intend to [100] marry Mrs. Thornquist, the defendant here can answer that, as to what his intentions were. As to whether or not divorce proceedings were started on one, two or three occasions, that can be testified to very quickly without all the testimony which has been offered.

The Court: What has been said will stand. You may ask her another question.

Q. You have referred to a number of incidents, and you haven't characterized whether or not the manner of—for example, you said something about beating on the door or trying to break in the house. Was that violent, non-violent, or what happened?

A. It was violent.

Q. About how long ago was it?

A. Well, December, 1947, and after that she knocked me down on the street.

Q. On any of these occasions when she came out to the house, did you have to call the police?

A. Yes I did.

Q. What did the police do about that?

A. They arrested her, took her down to the Ballard station.

Q. How about the time she knocked you down on the street? What were the circumstances there?

A. Well, she didn't want my husband to take me home. [101] She wanted him to take her home.

Q. How did this come about?

(Testimony of Margaret Verner.)

A. Well, we were standing on the corner and she was——

Q. When you say we, who do you mean by we?

A. My husband, Mrs. Thornquist, and myself, the three of us.

Q. Had the three of you been out together or something?      A. No.

Q. Tell just how this happened. It is not clear the way you are telling it.

Mr. Evans: I am going to object to this again.

The Court: The objection is sustained. Ask her another question.

Mr. Turner: If the Court please,——

The Court: You may have an exception.

Mr. Turner: Yes.

The Court: You may proceed.

Mr. Turner: I don't want to interfere with the Court's ruling, but I don't understand the theory.

The Court: The Court directs you proceed with another question. The objection is sustained.

Q. At any time, did you and Mr. Verner leave town in an endeavor to get away from her?

A. Yes, we went to California, because she had been out there four times in one day, making a scene, and it was [102] rather embarrassing so we went down to California and stayed for several months.

Q. During what year was that?

A. That latter part of 1945. We went in October and came back Christmas.

(Testimony of Margaret Verner.)

Q. Referring to this incident when Mrs. Thornquist knocked you down on the street, was she arrested at that time?

A. Not that evening, but she was.

Q. Did you make a complaint to the authorities about it?      A. Not for a couple of days after.

Q. I am not asking the time. Did you?

A. Yes I did.

Q. What was the result of those proceedings?

A. She was put under a peace bond.

Q. That was in Justice Court here in Seattle?

A. Yes it was.

Q. You have told about her chasing you in the car, trying to wreck the car. How did she do that?

A. We had been parked on First Avenue and she saw our car.

Q. When you say we, who is that?

A. My husband and myself.

Q. You were in your car? [103]

A. In our car, so she just followed us and kept ramming into the car and got ahead of us and tried to wreck us by running into us head-on, trying to force us into parked cars on Fourth Avenue, so we drove to the Police Station and they told her to go home. We were free to go home then. That evening when it was dark, we tried to sneak home but she caught us, wouldn't let us on the driveway. We were afraid our car would be wrecked so we drove madly around Ballard trying to escape her. In a service station finally at 70th and 15th—

(Testimony of Margaret Verner.)

Q. During all this period of time when Mrs. Thornquist was carrying on this pursuit and harassment, was Mr. Verner living at home with you?

A. Yes, he was.

Q. At any time, did you go to any other city besides this one in California you mention?

A. We moved to Spokane but she found out where we were and came over and made things very unpleasant so we went to San Francisco.

Q. Did you observe during this period of time when Mrs. Thornquist was pursuing in this fashion, that there was any strain or effect upon Mr. Verner?

A. Yes, there surely was. He finally got so desperate because he couldn't get away from her that he tried to commit suicide. [104]

Q. Did you find out what he did? A. Yes.

Mr. Evans: I object to this unless it is within her personal knowledge.

Mr. Turner: That is what I am asking her, her personal knowledge.

The Witness: I was there.

The Court: You may relate it.

Q. What was it?

A. He took about forty phenobarbital tablets.

Q. Those are what they call sleeping tablets?

A. Yes. I had a doctor who spent almost three days bringing him out of this. He didn't give me any hope at all at first and then during this time Ernest told me all about the whole thing and the practically blackmail that she was using.

(Testimony of Margaret Verner.)

Q. Did she make any attempt to follow you at any time down in California?

A. Well, the first time we went, I don't know how she ever guessed where we were but she—

Q. Just eliminate those side remarks.

A. She called long distance twice.

Q. Where did she locate you at that time?

A. At San Mateo. We were living in an auto court.

Q. At any time prior to the sending of this letter [105] did she cease her pursuit of Mr. Verner and the annoyance of yourself?

A. No, not entirely.

Mr. Turner: If the Court please, I have certain offers that I would like to make but other than that, I would like to conclude my direct examination, reserving the right to make the offers.

The Court: Is there any cross examination?

Mr. Evans: No cross-examination.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Turner. Mr. Horton.



## GEORGE W. HORTON

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Turner:

Q. Will you state your name please?

A. George W. Horton.

Q. Do you live here in Seattle? [106]

A. That's right.

Q. What is your business?

A. Service Station.

Q. Where is the service station where you are employed?      A. 70th and 15th North West.

Q. In Seattle?      A. That's right.

Q. You have been employed there for some time?      A. Four years.

Q. Do you know Mr. and Mrs. Verner?

A. I do.

Q. That is the defendant in this case and his wife?      A. Yes.

Q. Did you ever have occasion to see Mrs. Verne Thornquist?      A. Once.

Q. You were present in court and heard Mrs. Verner's testimony?      A. Yes.

Q. Did she refer in her testimony to the occasion on which you saw Mrs. Thornquist?

A. She did.

Q. Will you tell the jury just what happened on that occasion in your own words—that is, just confine it to [107] what you saw and heard.

(Testimony of George W. Horton.)

A. The two cars came in almost together, and Mr. Verner stopped and this woman got out and started using some rather vile language and names. When I asked her what the trouble was, she told me it was none of my business. Mrs. Verner asked me if I would come around to the other side of the car and she told me to call the police, which I did. Just before they got there, she got in her car and left.

Q. You say this woman used vile language and called him names and so forth. Are you referring to Mrs. Thornquist?

A. That's right. I guess that's who she was. I didn't know her.

Q. Describe the manner in which she did that. Was it in a soft spoken voice or loud?

A. It was rather a loud voice.

Q. I am not going to ask you to repeat any vile language, but what was the substance of what she said if you know or remember?

A. Well I don't remember that actually. I do know that she seemed to be directing it mostly at Verner, some awful names she was using. I don't know what the implication was, I didn't catch that part because it all happened so quick. She asked me to call the police and I walked in to call them and when I come out, she was gone. [108]

Q. Did you notice these cars before they came to a stop in your service station?

A. Yes, they went through once.

(Testimony of George W. Horton.)

Q. They went through the station?

A. Yes.

Q. Not in the street, but through the station?

A. That is right.

Q. You are on a corner, are you? A. Yes.

Q. And at what speed did they go through the station?

A. I would say about 35 or 40 miles an hour.

Q. Which car was in front and which was following? A. He was in front.

Q. That is, Mr. Verner was in front?

A. Yes.

Q. Mrs. Thornquist was coming behind, is that right? A. That is right.

Q. They were still that way when they went around the block and came back and came to a stop in your station?

A. That is right. He came in first.

Mr. Turner: That is all.

Mr. Evans: I have no cross examination.

The Court: You may step down.

(Witness excused.)

The Court: At this time the jurors are excused until [109] tomorrow morning at 9:30. You may now retire under the Court's previous admonitions.

(Jury retires.)

Mr. Turner: May the witness, Horton, be excused?

Mr. Evans: I would like to have Mrs. Nelson and Mr. Fardon excused, at least subject to being called by telephone.

Mr. Turner: I have no objection.

The Court: Mrs. Nelson and Mr. Fardon are excused subject to telephone call.

Mr. Turner: And the same also about Mr. Gardner?

The Court: The same is true of Mr. Gardner. He is likewise excused subject to telephone call.

I will hear either counsel in whatever they wish to address to the Court's attention.

Mr. Turner: With respect to the challenge, Your Honor, I just want the Court to know that I would be glad to attempt to discuss the theory behind the challenge if the Court desires it or if it would be regarded as helpful. I don't want to be in a position of not having offered to make it. I don't want to press it upon the Court if the Court believes he understands my objection.

The Court: I believe I do. The only thing I am anxious for you to have is an opportunity to make your [110] record. Is there anything indispensable to your making a proper record for you to say? If there is, say that, and if there is not, then the Court is satisfied and I do not believe there is any chance that the Court will change the ruling. I repeat, make no further statement in that regard except one you believe is absolutely indispensable for you to preserve a valid record.

Mr. Turner: I don't know whether the record shows that I did submit to the Court the defendant's memorandum of authorities for the use of the trial court.

The Court: I have a trial brief.

Mr. Turner: My theory is largely set forth in there as well as I could present it orally. Frankly, I am not aware of anything additional I could offer now.

I offer to prove by the witness, Margaret Verner, that in a conversation on the telephone early in Mrs. Verner's knowledge of Mrs. Thornquist, Mrs. Thornquist made the statement that she was going to take her husband, Mr. Verner, away from her, Mrs. Verner.

The Court: Is that all?

Mr. Turner: That is all of that offer.

The Court: What is the attitude of the government towards the offer?

Mr. Evans: That certainly has no bearing here. After [111] all, this statement is signed by the defendant, Your Honor. It is his statement, his signature is on it. There was no objection to this statement going in. Apparently it is true or else the defendant himself can take the stand and deny it if is not true. Anything that was said by anybody else to Mr. Mein is not material to the issues here.

This is a statement signed by the defendant. Mr. Mein has testified at the time Mr. Verner signed it, acknowledged to him that it was true, and that is all the testimony in reality that Mr. Mein has testified to and all that is pertinent. I cannot understand why or under what theory all of the defense's evidence thus far has been admissible. It certainly doesn't have anything to do with whether or not



this defendant did or did not mail these letters, whether or not they are lewd, lescivious and filthy, and those are the only issues in this case. I fail to understand where or how we can get off into trying a divorce action.

The Court: I understand this last offer concerns something said by Mrs. Thornquist?

Mr. Turner: That is right.

The Court: The objection is sustained.

Mr. Turner: If the Court please, we are offering that not for the proof of the facts stated, but as a [112] verbal act to disclose the attitude of Mrs. Thornquist as to whether or not this defendant or Mrs. Thornquist was the aggressor in that relationship.

The Court: I think the proof on that is ample so far. The objection is sustained.

Mr. Turner: I also offer to prove by the witness Mrs. Verner that subsequently and at about the time of the institution of this divorce proceeding—probably slightly before, I am not advised of the precise date, but it is approximately at that time, sometime in 1945, the latter part of 1945—Mrs. Thornquist in the presence of her own mother, Mrs. Dexter, called at the Verner home and in the presence of the defendant and Mrs. Verner, Mrs. Thornquist made a demand upon Mrs. Verner to give up her husband so that she, Mrs. Thornquist, could marry him.

Mr. Evans: That certainly is not relevant to any of the issues here. It is entirely hearsay. It is objected to by the government.

The Court: The objection is sustained.

Mr. Turner: May I have an exception to the ruling?

The Court: Allowed. Is there anything else that anyone wishes to mention in the absence of the jury?

Mr. Evans: I don't know how long we are going to have the type of testimony that we have had here. [113] I would like to remind the Court of the ruling in the Knowles case, the prosecution for depositing obscene matter in the mails: "The purpose of the defendant is immaterial, and that his motive was good is no defense." It seems to me that is what the defense is trying to put in here.

The Court: Will you give me the citation of the Knowles case?

Mr. Evans: 170 F. 409.

Mr. Turner: If Your Honor please, I intended to make this comment on counsel's position before. I don't know whether counsel is going so far as to admit that the first three paragraphs contained in Exhibit 1 which the government prepared have no bearing on the case. If that is his admission, I submit it still is not a valid argument.

They put the matter in, and they put in the manner, which would cast the defendant in a bad light, and it now does not lie in the government's mouth to say that it is inadmissible because it is there, and it is in the evidence, and they did it and I think we are entitled to repel that unfavorable inference which the government has cast upon the defendant

because of the relationship alleged in that statement.

However, if that is counsel's position, I still [114] don't understand it. If that is not his position, and if his position is that these first three paragraphs are admissible and relevant, as to which I think he is right in part, then we are entitled to get in the whole background, not just the portion the government selects.

The Court: I would think that the defendant cannot very well complain about the extent of the background that the Court has indulged so far. The Court is of the opinion that all of this is immaterial. If it was not in this statement, the Court of course would not hear any testimony of this sort.

It seems to me there should be some limit on the extent of the reception of this testimony, even when the subject was introduced by the government, and the theory on which the Court is acting is to give the defendant a reasonable opportunity to make any explanation of the things stated in those paragraphs. I believe that what has occurred already is a reasonable indulgence to the defendant in that regard, with the possible exception of any statements he might make in the defendant's case in chief when the defendant is called as a witness.

Is there anything else? I ask counsel on both sides to again search the authorities and see if there is anything in the authorities that definitely overrules [115] the rule announced in 160 F. at 706.

All parties and counsel are excused until tomorrow morning at 9:30.

(At 5:15 o'clock p.m., Tuesday, July 12, 1949 proceedings adjourned until 9:30 o'clock a.m., Wednesday, July 13, 1949.)

Seattle, Washington

July 13, 1949, 9:30 o'Clock A. M.

The Court: May the record show call of the jury is waived and that all jurors are present and also all parties on trial with their counsel.

Mr. Evans: The government agrees the record may so show.

Mr. Turner: Defendant agrees.

The Court: The defendant may now proceed.

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### CHESTER G. MacMILLAN

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Turner:

Q. Will you state your name please?

A. Chester G. MacMillan.

Q. Where do you live?                      A. Poulsbo.

Q. What is your business?

A. I am a retired banker engaged in the building effort for myself at the moment.

Q. And your business is in Seattle, is it?

(Testimony of Chester G. MacMillan.)

A. That's right.

Q. Formerly you were in the banking business?

A. Yes sir.

Q. What bank?

A. The National Bank of Commerce and its predecessor.

Q. How long have you been with that bank?

A. Twenty-five years and two months.

Q. When did you leave?

A. February 1, 1947. [117]

Q. While you were with the bank, did you know the defendant, Ernest Verner?

A. Very well.

Q. Was he then associated with the bank?

A. At the time I left, you mean, or when I was there?

Q. While you were there.

A. While I was there, yes.

Q. How long had he been with that bank?

A. He was with the National City Bank and in February of 1929 the National City Bank became part of the National Bank of Commerce so he was with the National Bank of Commerce from February 1929 until the time he left.

Q. When was that?

A. I am not too sure at the moment, I haven't given it any thought.

Q. Approximately? A. 1946.

Q. What was your position in the bank?



(Testimony of Chester G. MacMillan.)

A. Assistant cashier and head office administration.

Q. In that respect did you have charge of personnel at the bank?

A. No, I had an interest in the personnel in my particular department and personnel in the head office and its branches, generally speaking, that is part of the administrative work on the part of the head office. We are [118] not actively interested in it in the sense that you are an administrative officer of the personnel department.

Q. Were you familiar with Mr. Verner's reputation for truth and veracity?

A. Very familiar.

Q. Were you familiar with his reputation for being a law abiding citizen, good character?

A. In the work that he was doing, he had to be.  
Mr. Evans: I didn't understand that answer.

Q. Mr. MacMillan, the question was, did you know? I am trying to find out whether you knew what the character was.

A. Yes, I made it a point to know.

The Court: He made a voluntary answer and counsel for the plaintiff said he did not understand it. Do you wish it stricken?

Mr. Turner: It is up to the government, Your Honor.

The Court: Read the answer.

(Answer read by court reporter.)

(Testimony of Chester G. MacMillan.)

The Court: You may proceed and the answer will remain in the record.

Q. What was his character, integrity and honesty?

A. In the particular kind of work Mr. Verner was engaged in——

The Court: Answer directly. [119]

Q. The proper answer for you first to tell is whether that is good or bad as your opinion may be and then if you want to qualify it or explain it, you can add that afterwards.

The Court: Answer good or bad, whichever in your opinion it was.

The Witness: Very excellent.

Q. What was his reputation for truth and veracity? A. Very excellent.

Q. What was his character for being a law abiding citizen of good morals?

A. Still very excellent.

Q. What position did he hold in the bank at the time he left?

A. He was what you would call my administrative assistant, in all the matters in which I had an interest in the bank.

Q. Then you had very close supervision and detailed knowledge of his work and character there at the bank? A. Very close.

Q. Will you state whether or not Mrs. Verne Thornquist was employed at the bank?

A. She was.

(Testimony of Chester G. MacMillan.)

Mr. Evans: I am going to object to that question and ask that the answer already given be stricken. That is not a material issue in this case, as to where [120] Mrs. Thornquist worked or ever worked.

The Court: What bearing does it have?

Mr. Turner: The letters which form the basis of the charge refer to her employment at the bank, Your Honor.

Mr. Evans: The truth or falsity of what may be in these letters is not the issue here. The only issues are whether or not this defendant mailed them and whether he knew he shouldn't and whether they are lewd, lascivious and filthy.

The Court: The objection is sustained.

Mr. Turner: You may cross examine.

### Cross Examination

By Mr. Evans:

Q. You have testified on a number of points of character of the accused here. Are you testifying from your own personal knowledge or from what other people have told you?

A. My own personal knowledge, sir.

Q. Then your opinion here as to his character as you have outlined is not based on anything else anyone else has told you?

A. Absolutely not.

Q. Strictly on your own personal knowledge?

A. Yes sir.

Q. Your own opinion?

A. Yes sir.

Q. Do you live in the community where he lives?

(Testimony of Chester G. MacMillan.)

A. Not now. I did at this time.

Q. What?

A. I lived in Seattle at this time. I don't live in Seattle now. I just work here. How did you mean your question?

Q. That is during the period of time you were speaking about when you say you knew his reputation?

A. I was a resident of Seattle.

Q. Did you live in the same neighborhood he lived in?

A. He lived in Ballard and I lived out in the University district.

Q. About two or three miles apart?

A. That is right.

Q. You are certain none of this information you have given here was gained from talking with other people?

A. I can amplify that or I can answer just plain no.

Mr. Evans: I move that this witness's testimony as to his reputation be stricken. It is his own opinion, it is not based upon his reputation. Reputation is based upon what other people think about it.

The Witness: I was not paying any attention to [122] the words. I am sorry.

Mr. Turner: I don't think the cross examination demonstrates the ground on which the government relies. I know that it is susceptible to that construction but I don't think it is a fair appraisal. I think the questions were leading and they had a legal

(Testimony of Chester G. MacMillan.)

significance that the witness did not appreciate. I think I should be allowed to develop further—on direct examination, he testified that he knew that reputation and I don't think the motion was well taken.

The Court: I understand from the attempted statement of the witness that he wanted to make some explanation of his answer. In view of that fact and in view of your request, the Court will reserve ruling and give you the opportunity of further inquiring of the witness, whenever you have finished or now, which ever is more convenient to the government counsel. The Court will give the defendant the opportunity of further examination as a witness.

Mr. Evans: I would like to continue with my cross examination.

The Court: You may do that.

Q. I believe your testimony as to his character refers back to 1947 and prior to that time, is that correct?      A. That is correct. [123]

Q. You know nothing about his present reputation, as I understand it?

A. I am very familiar with his present reputation now too.

Q. You say you live at Poulsbo?

A. That's right.

Q. About how far is Poulsbo from Seattle?

A. About an hour and fifteen minutes. I commute every day.



(Testimony of Chester G. MacMillan.)

Q. You are still working here in Seattle?

A. That is right. I spend quite a bit of time down in the National Bank of Commerce incidentally.

Q. How many people have you discussed Mr. Verner's reputation with during the last two years?

A. Probably fifty or seventy-five.

Q. You have made it a point to discuss his reputation with other people?      A. Certainly.

Q. What has been your purpose in discussing his reputation with other people?

A. Mr. Verner is a very good friend of mine. I worked with him for years. I am very interested in everything he does.

Q. How long has that friendship lasted?

A. Since 1933 particularly. [124]

Q. You consider him a personal friend of yours since 1933?      A. Absolutely.

Q. Very close personal friend?

A. Very close personal friend.

Q. As I understand it, you consider him to be a law abiding citizen, is that part of your direct testimony?

A. Well, I have to stop and think—the use of the words you put in here sometimes aren't the way I usually use them.

Q. I am not trying to put words in your mouth you didn't say. Was that the import of your testimony on direct examination that he has a good reputation for a law abiding citizen?

(Testimony of Chester G. MacMillan.)

A. I can't think of any ulterior motive in that, so I will say yes.

Q. Will you read Exhibit 3, not out loud but to yourself, and let me know when you have finished? Have you had an opportunity to read it?

A. That's right.

Q. There is mention in there of certain illicit relationships by Mr. Verner? Did you know about those relations at the time you testified as to his reputation for being a law abiding citizen?

A. I have no direct knowledge of any of these things [125] that happen here.

Q. If you had known of the contents of this letter prior to giving your testimony, would you still say he had a good reputation for being a law abiding citizen?

A. I would like to ask the lawyer for the defense how to answer that question. It seems like you are splitting a hair here. I am more than a little interested in what you are doing.

The Court: The question is one of fact and not one of law. It is a question of what was in your mind as of the time inquired about, so you should answer the question from that standpoint.

The Witness: In the first place, I am not familiar with the point of law in which the question is asked.

The Court: It is not a point of law, it is a question of fact. It is a question of what actually, under the conditions stated, would have been your attitude.

(Testimony of Chester G. MacMillan.)

The Witness: Well, the words law abiding citizen indicate you are not breaking any laws. Does this letter indicate that some law has been broken? That is a job for lawyers, I am not a lawyer.

Q. The question is, had you known about this letter and its contents prior to giving your direct testimony, would you still say that this defendant had a good reputation as a [126] law abiding citizen?

Mr. Turner: I object to that as an unfair question. The direct examination related to the time when Mr. Verner was employed at the bank, which terminated about 1946. That was expressly brought out in direct examination. The letter was not mailed until 1948, some two years later. Now counsel for the government has on cross examination carried the matter down to date, to a subsequent time. I have no particular objection if he wants to find out if this witness knows about his reputation at the present time, but it grossly unfair to the witness to put a question like that which assumes in its very wording that a letter written two years subsequent to the time of his testimony on direct is in contradiction of that testimony relating to the earlier time. It is unfair.

The Court: Read the last question in its final form propounded by interrogating counsel.

(Last question read by reporter.)

The Court: The objection is overruled.

The Witness: I am having a pretty difficult time

(Testimony of Chester G. MacMillan.)

making up my mind what is a law abiding citizen. I don't know what comes under that category, frankly. I have never been asked that question before.

Q. You have testified, I believe, that he was a law [127] abiding citizen. My purpose is to consider what you consider a law abiding citizen.

A. I am trying to find out what the law thinks is a law abiding citizen before I answer it.

Mr. Evans: I ask that the witness be instructed to answer the previous question which I put.

The Court: Will you read that letter your attention was referred to and note the contents of the letter and after you read it silently, I wish to have this question read again and then the Court will ask you to make an answer to the best of your ability.

Mr. Turner: If the Court please, I think in view of the previous rulings of the Court, the defendant should make a further objection now to that question, that is, that the question brings up the issue of the truth of the matters alleged in the letter.

Counsel for the government has previously taken the position with this Court that the truth of the matter referred to had no bearing upon this case, and yet he is now assuming the truth of the matters alleged in that letter in the cross examination of this witness. I think that definitely opens up the truth of the matters alleged. I am perfectly willing to go into that matter, and the defense is going to

(Testimony of Chester G. MacMillan.)

offer testimony about the truth of the matter if this objection is [128] overruled.

The Court: The objection is overruled. The Court pauses for a moment to see if there are any further objections, after which I wish the witness to have an opportunity of considering the matter before him with a view to making answer.

Mr. Turner: Defendant has no further objection, Your Honor.

The Court: Read the question in its final form and let the witness consider that question.

(Last question read by reporter.)

The Court: Read this exhibit and make answer to the question as best you can.

The Witness: Previous to reading the letter, in my opinion he had a good reputation as a law abiding citizen.

Q. I will ask you what is your opinion in that regard after having read the letter?

A. Well, I am back where I was a minute ago. What is the point of law on this one? I am confused and hesitant to answer it. You have got an implication in there that somebody is guilty of something. I am concerned over my answer, I am guilty before I answer it.

Q. Do I understand you are reluctant to answer my last question? [129]

A. Yes.

Mr. Evans: No further questions.



(Testimony of Chester G. MacMillan.)

Redirect Examination

By Mr. Turner:

Q. Mr. MacMillan, will you state whether or not your administrative duties included knowing what the standing of the men in responsible positions in the bank was?

A. That was. That particular phase was part of my duties and particularly in regard to Mr. Verner.

Q. Why particularly with regard to Mr. Verner?

A. As administrative assistant, he was in charge of hundreds of millions of dollars in securities, possibly one hundred million dollars in cash and corresponding bank accounts. There cannot be any question or any doubt as to the honesty or integrity of people engaged in such work.

Mr. Turner: That is all.

Recross Examination

By Mr. Evans:

Q. Mr. MacMillan, were you present working at the bank at the time Mr. Verner's employment there was terminated?      A. Yes.

Q. Will you state whether or not he was not asked to [130] resign?

A. Say that again. What do you mean, asked? You have two words in there I don't put together.

Q. I will rephrase the question. Isn't it a fact that he was asked by the officials of the bank to resign because his accounts were in such bad shape, it was necessary to ask him to resign?

(Testimony of Chester G. MacMillan.)

A. That is not true.

Q. It is not true?           A. It is not true.

Q. You are certain of that?           A. Positive.

Q. Isn't it a fact that he was asked to resign?

A. That is true.

Q. Why was he asked to resign?

A. Doubtless because of his association with Mrs. Thornquist. His conduct became a little lax in his transactions with other department heads and branch managers, and he was probably guilty of—the word guilty is not right, let me think a minute—I would like to strike out the word guilty, I don't like that word. His only errors were in approach to problems of jurisdiction, coming into the heading of good business judgment, and as such in his capacity it was necessary for him to use good business judgment in practically all cases. [131]

Q. How long had he been employed in the bank?

A. Well my experience is from February 23, 1929. I don't know how long he worked for the National City.

Q. And suddenly his business judgment became faulty?           A. Yes.

Mr. Evans: I have no further questions of this witness.

Mr. Turner: No questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Turner: Mr. Verner.

## ERNEST VERNER

called as a witness by and on behalf of defendant, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Turner:

Q. Your name is Ernest Verner?

A. It is, sir.

Q. You are the defendant in this case?

A. I am. [132]

Q. State your age. A. Forty-three.

Q. You have been married for about 22 or 23 years? A. That's right.

Q. Up until the time you became involved with Mrs. Thornquist, there was no trouble between you and your wife? A. That's right.

Q. You were happily married?

A. That's right.

Q. You were then during that period or at least most of that period, employed by the National Bank of Commerce?

A. And its predecessor, that's right.

Q. Then you were requested to resign as testified to by Mr. MacMillan?

A. That is correct.

Q. Since that time, what has been your occupation?

A. Oh, I put in—right after that I put in approximately two and a half years with the government.

(Testimony of Ernest Verner.)

Q. In what part?

A. General accounting office.

Q. And were you working here or elsewhere?

A. I started with the Seattle office, transferred to San Francisco, or Spokane prior to San Francisco, all for the same——

Q. Seattle, Spokane and San Francisco in that order? [133]      A. That's right.

Q. What is your business at the present time?

A. I am secretary-treasurer of the Radio Dispatch Company. That is where I devote most of my time to. Also we have two other corporations.

Q. In addition to that, have you done other work on the side?      A. Some accounting work.

Q. Over what period of time have you done that?

A. January of 1948.

Q. Didn't you do some accounting work prior to that?      A. When I was at the bank?

Q. Yes.

A. I had a couple of small accounts then, yes.

Q. That was on the side?      A. That is right.

Q. I will ask you to refer to Plaintiff's Exhibit 1. Will you examine that and state whether or not that is true as it is expressed there—first I want to ask you whether that is your own language?

A. No, I did not write that.

Q. Are there any statements in there that are not correct or which convey an incorrect implication which is not in accordance with the truth?

A. There is, sir. [134]

(Testimony of Ernest Verner.)

Q. Which are they?

A. The second paragraph, and the second sentence in paragraph 3.

Q. Did you read the statement over before signing it?

A. I glanced it over, that's right sir.

Q. At that time you signed it, did you appreciate those statements were incorrect?

A. I did not.

Q. Tell the jury what happened at the time of this interview with Mr. Mein?

Mr. Evans: I am going to object to that type of question. I think counsel should stick to question and answer.

The Court: I believe that is better. Ask him specifically concerning some particular phase of—the question is too general. The objection is sustained.

Q. How long did that interview last?

A. An hour and a half, between an hour and an hour and a half.

Q. Would you state whether or not very much was said which is not included in this statement?

A. Well, no hour and a half conversation can be put on three paragraphs on one sheet of paper.

Mr. Evans: I ask the answer be stricken.

The Court: It is stricken. The jury will [135] disregard it. Just answer the question.

The Witness: Could I have the question again?

The Court: Read the question.

(Last question read by reporter.)



(Testimony of Ernest Verner.)

The Witness: Yes.

Q. Was anything said about the background, particularly with reference to your relationship with Mrs. Thornquist? A. It was.

Mr. Evans: I am going to object to this line of testimony. The witness is not disputing the statement except in two or three respects. If he disputes that, he can say so. I see no reason to go into all that they may or may not have talked about at the time.

The Court: The Court is going to sustain the objection. I respectfully suggest to counsel interrogating that he call to the witness's attention a statement or statements in this written statement and ask him if there are any pertinent questions which may properly be propounded to the witness concerning those statements in that written form which is Exhibit 1 that you invite his attention to and ask him questions about.

Q. I call your attention to the second paragraph and ask you whehter or not that is a correct expression of what you told Mr. Mein at that time?

A. This second paragraph? [136]

Q. Yes. A. No.

Q. What did you tell Mr. Mein, if you recall?

A. I had started divorce proceedings.

Q. Did you also indicate to him whether or not this was a matter of your own instigation or whether it was at Mrs. Thornquist's insistence?

A. I did tell him so.

(Testimony of Ernest Verner.)

Q. Which did you tell him? My question was in the alternative.

A. That it was her instigation.

Q. At her instigation?

A. That's right sir.

Q. What was the fact?                      A. It was.

Q. Actually, how did it come about that you did institute those divorce proceedings?

Mr. Evans: I am going to object to this. I don't believe it is material as to why or if he instituted divorce proceedings.

The Court: The objection is overruled.

The Witness: What is the question again, please?

Q. Read the question.

(Last question read by reporter.)

A. Upon her insistence. [137]

Q. Did you tell Mr. Mein that you had the intention of marrying Mrs. Thornquist?

A. I did at one time.

Q. What was the time of that intention?

A. 1946.

Q. Did you ever abandon that?                      A. I did.

Q. Did you try to return to your family, to Mrs. Verner?                      A. I did.

Q. How many attempts did you make to get rid of Mrs. Thornquist?

A. I doubt if anyone could count them.

Q. You will state it is a large number?

A. Several times.

(Testimony of Ernest Verner.)

Q. Did any of them work? A. No sir.

Q. At the time referred to in the third paragraph, which was shortly before December 1, 1948, is the first sentence correct, that you had learned that Mrs. Thornquist was associating with Mr. Fardon? A. I had heard it, yes.

Q. Referring to the second sentence, is that correct?

A. That was not the gist of the conversation.

Q. Do you recall what the conversation was on that [138] point? A. I do.

Q. What was it?

A. I became angry at the trouble she had caused me previously.

Q. Did you tell Mr. Mein about that?

A. I certainly did.

Q. Did you say anything to him in substance that you became angry in the sense of being jealous of Mr. Fardon or anything of that sort?

A. No sir.

Q. Did you also tell him whether or not you had mailed a copy of this letter to Mrs. Thornquist?

A. I did.

Q. Did he know that you had mailed one at that time? A. I told him I had.

Q. Before you told him, did he know it or did he indicate that he knew it?

A. He told me he had not contacted her yet.

Q. He said nothing to indicate to you whether your statement to him was enough?

(Testimony of Ernest Verner.)

A. No sir.

Q. What did Mr. Mein tell you about the character of your interview with him?

Mr. Evans: Just a moment. Who do you refer to as [139] him?

Mr. Turner: Mr. Mein.

Mr. Evans: I am sorry, I don't understand the question.

The Court: Read the last question.

(Last question read by reporter.)

Mr. Turner: I will rephrase it. What did Mr. Mein say to you at the time of this interview with him, your interview with him on or about December 1st, about the character of that interview, what he was doing?

A. I was called in. He told me he was making a routine check on the complaint.

Q. In what manner did he make that statement, with particular reference to whether it should be regarded as a serious matter?

A. That it was just a routine check up, probably nothing will come of it, but that wasn't up to him to say whether it would or wouldn't.

Q. Did he make that statement to you about its being a routine check up and nothing might come of it more than once?      A. Several times.

Q. Did he also advise you that you had the right to have an attorney? [140]

A. He told me I could have an attorney, he did not advise me to.

(Testimony of Ernest Verner.)

Q. He didn't advise you to have one?

A. He didn't come right out and say advise, he said I could have one.

Q. How many times did he tell you that?

A. At least once or twice.

Q. Did he make any statement to suggest there was no need—to convey to your mind the need of the presence of an attorney at that interview?

A. No sir.

Q. Did you in fact appreciate that you needed one at that interview?      A. No sir.

Q. Will you state whether or not Mrs. Thornquist was in fact the aggressor in the formation of your relationship with her which culminated in your leaving your home?      A. She was.

Mr. Evans: I am going to object to this as being entirely irrelevant and immaterial.

The Court: The objection is overruled.

Q. Will you answer the question, please?

A. She was.

Q. Did you know it at the time it began? Did you know that she was the aggressor, did you appreciate that? [141]

A. Not at the time, no.

Q. You left home about what time?

A. December, 1945.

Q. And then subsequently a divorce proceeding was instituted in your name against Mrs. Verner, was it?      A. The early part of 1946.



(Testimony of Ernest Verner.)

Q. Can you tell who made the arrangement for the attorney?      A. She did.

Q. That is Mrs. Thornquist?

A. That is correct.

Q. Did you stay with Mrs. Thornquist over a period of time?      A. I lived at their house.

Q. About what period of time did that relationship continue?

A. January through April, 1946.

Q. And that relationship was in fact an illicit relationship?      A. It was.

Q. Then you subsequently decided to break it off and return to your wife?      A. I did.

Q. Did you do that?      A. I did that. [142]

Q. After you did that, at the time you did that, did you endeavor to break off your relationship with Mrs. Thornquist?      A. I did.

Q. What did she do?

A. Insisted on it being the other way.

Q. That is, on the continuance of the relationship?

A. On a continuance of my leaving my wife, yes.

Q. Did she also insist that you marry her?

A. That's right.

Q. To what extent did she go in endeavoring to carry out her will that that should come about?

Mr. Evans: I am going to object to this. I think there has been all the latitude allowed that should be allowed in going into this man's troubles in that regard if any. It hasn't anything to do with bear-

(Testimony of Ernest Verner.)

ing on whether or not he mailed the letter, whether or not it was lewd, lascivious and filthy. Those are the only issues involved here.

The Court: To what extent or length do you expect in this particular inquiry?

Mr. Turner: I want to characterize it in general, to give the jury the fact that this was a matter of terrific stress. I don't want to go into it in great detail, but I do think—— [143]

The Court: The objection is overruled for the purpose stated.

Q. Just face the jury and tell them, describe to them the character of Mrs. Thornquist's action in that regard that I referred to in my question.

Mr. Evans: I am going to object to the witness being permitted to literally make an argument to the jury. I am going to ask counsel be required to confine it to question and answer.

The Court: The objection is sustained. Proceed by question and answer.

Q. Read the question.

(Last question read by reporter.)

A. By creating scenes and embarrassment.

Q. You say creating scenes and embarrassment. What would she do? Would she come to your office, for example?

A. She has been there lots of times.

Q. What offices and where?

A. One of them, the General Accounting Office, when we had our office in the Central Building. The

(Testimony of Ernest Verner.)

General Office Accounting in Spokane, the clients I had at their homes, the clients I had here in town over in the market, and lately in my own office on Fourth Avenue.

Q. What for example did she do with respect to the client at the client's home? You were out there to do some [144] accounting work, is that right, or tax work? A. That is right.

Q. What did you find when you came out of your client's house?

A. She came in before I got out.

Q. And what had she done?

A. Used her influence on them to persuade me to leave my wife, which she has done on all occasions.

Q. What did she do in the General Accounting Office right here in the Central Building? Can you give an instance of a scene of humiliation and embarrassment she caused you?

A. Well, it was in the summer time, it was very hot and I had the door open. She would walk in and out, spent constantly the eight-hour shift I was working standing in the door.

Q. Did she ever use physical violence on you in that General Accounting Office?

A. Not in the General Accounting Office.

Q. Did she at any other place?

A. In my own office on Fourth Avenue, yes.

Q. What did she do at that time?

A. Slapped me.

(Testimony of Ernest Verner.)

Q. About what?

A. The same question. [145]

Q. About returning to her?

A. About leaving my wife.

Q. Did you ever get her to agree to leave you alone?  
A. I did.

Q. How many times? A. Several.

Q. When you left Seattle and went over to Spokane, did you let her know what your residence address was over there? A. No.

Q. You tried to conceal it from her?

A. She never had my residence address in Spokane.

Q. Did she write to you over there?

A. At the office, yes.

Q. Did you receive letters from Mrs. Thornquist?  
A. Yes sir.

Mr. Turner: I have four illustrative letters.

Mr. Evans: I am going to object to their even being marked as exhibits. Such a line of questioning going on here is entirely outside the issues of this case. The truth or falsity of the matters in this letter are not in issue. This is not a libel case, this is not a divorce case. The only issues involved here are whether or not this defendant placed the letters in question in the mail and whether or not they are [146] lewd, lascivious and filthy and whether or not somebody else wrote him some letters or not can have no bearing on that question.

The Court: The Court believes that the matter

(Testimony of Ernest Verner.)

of intent with which he operated is at issue and the Court is admitting these matters to the extent which the Court has up to this time admitted them as bearing upon the question of the defendant's mind and intent with which he operated. You may have them marked.

(Letter marked Defendant's Exhibit A-1 for identification.)

(Letter marked Defendant's Exhibit A-2 for identification.)

(Letter marked Defendant's Exhibit A-3 for identification.)

(Letter marked Defendant's Exhibit A-4 for identification.)

Mr. Turner: I would like to say for the Court's information that these letters have no connection with each other.

Q. Mr. Verner, will you look at that letter, Exhibit A-1 for identification and state if you know whose handwriting [147] that is? A. I do.

Q. In whose handwriting is the letter?

A. Mrs. Thornquist's.

Q. Did you receive it on or about the date it bears? A. I did.

Mr. Turner: I will offer it in evidence.

Mr. Evans: What is that date?

The Witness: 2-2-45.

Mr. Evans: It is objected to as not being within the issues of this case. It doesn't make any difference what Mrs. Thornquist may have written to this



(Testimony of Ernest Verner.)

defendant. The defendant is not charged with having received any letters from Mrs. Thornquist, or he is not being charged with his relationship with Mrs. Thornquist.

The sole issues in this case are whether or not he mailed these letters and whether or not they are lewd, lascivious and filthy and there are no other issues in this case. Opening up these issues serves no purpose at all. The only intent involved in this case is whether or not he intended to put these letters in the mail box and have them conveyed by mail.

Certainly, having received letters from Mrs. Thornquist can have nothing to do with his intent as required by the Statute. These letters have absolutely [148] nothing to do with the issues in this case at all.

The Court: The objection is overruled. Defendant's Exhibit A-1 is admitted.

(Defendant's Exhibit A-1 received in evidence.)

## DEFENDANT'S EXHIBIT No. A-1

[Letter]

2-2-45

Dear Punkin:—

Here I sit in my little bed, with your picture in front of me, writing you a letter as I promised. I wish you were here! I'll be so glad when the day comes that I won't have to let you go every night.

## Defendant's Exhibit No. 1-A—(Continued)

It is pouring rain & I can sit here & listen to the rain on the roof—it sounds good—it fact I hope it rains all day tomorrow. And incidentally I'm going to keep you in tomorrow afternoon & make you relax for once. No kidding, sweetheart, you've just got to or you'll get sick & then where would we be? I'd just actually die if anything ever happened to you—so—you've got to mind & do as I say! And—no gadding about tomorrow.

Tomorrow makes two months of the most happiness I have ever known. It's only the beginning darling—everything will work out just like we want it. It has to; otherwise life just wouldn't be worth living as far as I'm concerned. Now you quit worrying about things because it's all going to be alright.

I love you dear & there aren't many people in this world who are lucky enough to have anything as nice as you are—so I feel very fortunate. I just know we're going to have the most wonderful life anyone has ever had & it's only the waiting for it to begin that is difficult.

Goodnight, darling & I do dream of you every night.

From

Your baby.

[Endorsed]: Filed October 26, 1949.

(Testimony of Ernest Verner.)

Q. Now, Mr. Verner, would you first state whether or not at the time you received that letter you were living with Mrs. Verner at home to the knowledge of Mrs. Thornquist?

A. February, 1945? Yes.

Q. May I read the letter to the jury now, Exhibit A-1?

The Court: You may do so now or later, whichever would be preferred.

Mr. Turner: I think it would be better now because we are skipping large portions of time, Your Honor.

The letter is dated 2-2-45.

“Dear Punkin:

Here I sit in my little bed, with your picture in front of me, writing you a letter as I promised. I wish you were here! I’ll be so glad when the day comes that I won’t have to let you go every night.

It is pouring rain & I can sit here & listen to the rain on the roof—it sounds good—in fact I hope it rains all day tomorrow. And incidentally I’m going to keep you in tomorrow afternoon & make you relax for once. No kidding, sweetheart, you’ve just got to or [149] you’ll get sick & then where would we be? I’d just actually die if anything ever happened to you—so—you’ve got to mind & do as I say! And—no gadding about tomorrow.

“Tomorrow makes two months of the most happiness I have ever known. It’s only the beginning darling—everything will work out just like we want

(Testimony of Ernest Verner.)

it. It has to; otherwise life just wouldn't be worth living as far as I'm concerned. Now you quit worrying about things because it's all going to be all-right.

"I love you dear & there aren't many people in this world who are lucky enough to have anything as nice as you are—so I feel very fortunate. I just know we're going to have the most wonderful life anyone has ever had & it's only the waiting for it to begin that is difficult.

"Goodnight, darling & I do dream of you every night.

From  
your baby."

Q. What is Exhibit A-2—first is an envelope you received through the mail? A. It is.

Q. Attached to it are two or three other sheets. Will [150] you tell what those three other sheets are? Were they enclosed in the letter when you received it? A. They were.

Q. One of those is a blank sheet, an entirely blank sheet of paper? A. It is.

Q. That was folded up with the two small sheets enclosed in it? A. That's right.

Q. Were the small sheets stapled together and inside the folded sheet when you received it?

A. I don't know if they were stapled together.

Q. But they were there, is that right?

A. That's right.

(Testimony of Ernest Verner.)

Q. Will you state what those are, those small sheets, are they slips from a calendar pad, a desk calendar pad?       A. They are.

Q. Did they have those circles drawn in pencil on them at the time you received them?

A. That's right.

Q. Do you recognize the handwriting appearing on the second of those calendar pad slips?

A. I do.

Q. Whose is it?

A. Mrs. Thornquist's. [151]

Q. Refer again to the first page of that Exhibit, which is the envelope, and look at the post mark. Did you receive that letter in the mail on or about that date?       A. No.

Q. By the way, what is the date that is on there? The post mark?       A. December 4, 1945.

Q. About when did you receive it?

A. I came home from California the day before Christmas. It would have to be December 24th.

Q. At the time the letter was mailed, you and Mrs. Verner were in California?

A. I had been in California since October, that is right.

Q. Mrs. Thornquist didn't know your address down there?       A. That's right.

Q. You still owned your home here in Seattle?

A. That is correct?

Q. This was mailed to you at your Seattle home?

A. That is right.



(Testimony of Ernest Verner.)

Q. You got it on your return to Seattle about Christmas time in that year?

A. We returned home the day before Christmas, that's right. [152]

Q. You and Mrs. Verner came together?

A. That's right.

Q. On the first of those calendar pad slips, the date circled is what? A. November 27th.

Q. And what is that date?

A. That date is an anniversary, the first time we went out.

Q. By we, you mean you and Mrs. Thornquist?

A. That's right.

Q. What is the second date, the second circled date? A. December 3rd.

Q. What is that date?

A. That is the date she wrote to her husband overseas asking for a divorce.

Q. Was he in the service at that time?

A. He was in Belgium.

Q. So when you first knew her, she had a husband of her own, is that right? A. She did.

Mr. Turner: I will offer Exhibit A-2 in evidence.

Mr. Evans: Same objection I made heretofore.

The Court: Overruled. Defendant's Exhibit A-2 is admitted. [153]

(Defendant's Exhibit A-2 received in evidence.)

DEFENDANT'S EXHIBIT NO. A-2

[Envelope postmarked]: Seattle, Wash., Dec. 4,  
2:30 P.M., 1945.

[Letterhead Seattle Rubber Stamp Co.]

Mr. Ernest Verner

1007-W. 67th.

Seattle, Washington.

[Memo pad]: Tuesday, November 27, 1945.

[Memo pad]: Monday, December 3, 1945.

Doesn't it mean anything anymore?—V. T.

---

(Testimony of Ernest Verner.)

The Court: At this time we will take a ten minute recess.

(Recess.)

The Court: All are present as before the recess. You may proceed.

Q. Mr. Verner, before reading this, I call your attention to the fact that these two slips from the calendar pad appear to have been taken from the 1945 calendar. I think your testimony was that the dates circled were the 27th of November and the 3rd of December. They were anniversary dates, were they? A. That's right.

Q. The 27th of November referring to the date when you were first out with her?

A. That's right.

Q. Referring to what year as to the time you were first out with her ?

A. The year on the calendar pad has no bearing on it whatever, no significance in the year at all.

(Testimony of Ernest Verner.)

Q. The first time you had been out with her was in the year 1943, is that right?

A. That's right. [154]

Q. And the day she decided to divorce her husband was in what year?

A. 1944. The other one is 1944, November 27, 1944.

Q. There is nothing whatsoever on the first calendar date, just a pencil mark around the date on the calendar. The second date, December 3rd, is also circled in pencil and in handwriting below it, it says "Doesn't it mean anything any more? V. T."

Will you refer to Exhibit A-3. You received that in the mail, did you?      A. I did.

Q. In whose handwriting is that?

A. Mrs. Thornquist's.

Q. What was the date?

A. April 7, 1947.

Q. You were in Spokane, were you?

A. That's right.

Q. Will you refer to, I think it is the third page of the letter? There is a name, Addie, mentioned. Who is Addie?

A. My wife.

Mr. Turner: I offer Exhibit A-3 in evidence.

Mr. Evans: Objected to for the same reasons given heretofore.

The Court: The objection is overruled. Defendant's [155] Exhibit A-3 is admitted.

(Defendant's Exhibit A-3 received in evidence.)

(Testimony of Ernest Verner.)

DEFENDANT'S EXHIBIT NO. A-3

[Letter]

Sunday

My Dearest Darling—

There is no need to write & attempt to describe to you how I feel. You are feeling just as I do at this very minute. I can feel it. I know it is so.

This is not a letter to ask "Why." I only want you to have my thoughts to keep with you forever.

I love you more than life itself. You know this as surely as you know your own name. Nothing will ever change my feeling.

I have read between the lines in your recent letters & have known for a long while what was going to eventually happen. Although I've hoped against hope that I was wrong.

I don't know if this letter will bring you any comfort or not. I only write hoping that in some small way I can help you regain your sense of balance. I know on what a thin thread it is depending—even right now. I can understand everything—there is no need for you to have to tell me.

I shall never stop loving you—no one can ever rob me of that small happiness. And it is small I know. This one truth remains & don't you ever forget it!! The day Addie Dies I'll still be waiting for you & loving you. Keep that thought in your mind—I can't change it even if I would.

Defendant's Exhibit No. A-3—(Continued)

I hope somehow I will know as time goes by that you are well & what you are doing. If there is no way for me to know this I want you to know that I wish the best there is for you always. If you ever want to hear from me or need me in any way, I'll be right here.

I'm just remembering the good—don't give up, darling—try & find some happiness for yourself some way as I will have to do.

You have my heart & my love to keep with you forever.

/s/ VERNE.

[Envelope]

[Rubber Stamp] Via Air Mail, Special Delivery,  
Via Air Mail.

[Rubber Stamp] Special Delivery. Deliver to  
Addressee Only. Return receipt requested.

[Rubber Stamp] Fee Claimed at Spokane, Wash.

[Rubber Stamp] Registered No. 66747.

Ernest Verner

c/o U. S. Gen'l. Accounting Office

Room 505—Welch Bldg.

Spokane 8, Washington

[Postmarked] Seattle, April 7, 1947, Wash.

[Return Address on back of envelope]

Verne Thornquist

1115 - 32nd Ave.



(Testimony of Ernest Verner.)

The Court: You may read it now or later, whichever is more convenient.

Mr. Turner: This is an airmail, special delivery, return receipt requested letter, deliver to addressee only, addressed to Mr. Ernest Verner, c/o United States General Accounting Office, 505 Welch Building, Spokane, dated Sunday.

“My dearest darling:—

There is no need to write & attempt to describe to you how I feel. You are feeling just as I do at this very minute—I can feel it—I know it is so.

“This is not a letter to ask ‘why’. I only want you to have my thoughts to keep with you forever.

“I love you more than life itself. You know this as surely as you know your own name. Nothing will ever change my feeling.

“I have read between the lines in your recent letters & have known for a long while what was going to eventually happen—although I’ve hoped against hope that I was wrong.

“I don’t know if this letter will bring you any comfort or not. I only write hoping that in some small [156] way I can help you regain your sense of balance. I know on what a thin thread it is depending—even right now. I can understand everything—there is no need for you to have to tell me.

“I shall never stop loving you. No one can ever rob me of that small happiness. And it is small I know. This one truth remains & don’t you ever forget it!! The day Addie Dies I’ll still be waiting for

(Testimony of Ernest Verner.)

you & loving you. Keep that thought in your mind—I can't change it even if I would.

“I hope somehow I will know as time goes by that you are well & what you are doing. If there is no way for me to know this I want you to know that I wish the best there is for you always. If you ever want to hear from me or need me in any way I'll be right here.

“I'm just remembering the good. Don't give up, darling—try & find some happiness for yourself some way as I will have to do.

“You have my heart & my love to keep with you forever.

Verne.”

Q. The date of this letter, Mr. Verner, was this shortly after that suicide attempt?

A. That is right. [157]

Q. That was over in Spokane? A. Yes.

Q. Is Exhibit A-4 a letter you received from Mrs. Thornquist? A. It is.

Q. Did you receive it on or about the date it bears?

A. I imagine the next day, about the 14th of May.

Mr. Turner: I will offer that in evidence.

Mr. Evans: Same objection.

The Court: Overruled. Defendant's Exhibit A-4 is admitted.

(Defendant's Exhibit A-4 received in evidence.)

## DEFENDANT'S EXHIBIT A-4

[Letter]

Tuesday, 4:45 P.M.

Dear Punkin:

Received your cute letter this morning & was very much relieved to know you arrived safely. You made good time, too. Next time it's going to be a one-way trip & no return ever!!! I'm lining up all kinds of ideas for us & they are just waiting for your arrival to sort out & decide on. There surely are a lot of things that we can do & I know we'll be a success at it, too.

I couldn't talk to Ray yesterday as I told you in my letter last night. I just called him & as she was there he couldn't talk & asked me to phone him at home tonight so I'll see then what he has to say.

I saw J. W. Maxwell in the bank today & he stopped & talked to me for a few minutes. Said Geo. Bringoff was retiring Sept. 1st & they wanted him to retire also & he said he told them to go to hell & those are his exact words. I thought I'd die laughing. Said he'd put it up to a public vote if they tried to force it & he knew he'd win, too. He wished me a lot of luck in whatever I do & said it was nice to see me looking so well. What do you know about that? Also said there were a lot of things happening down there.

Well I've got to dash home & try & sell the refrigerator & make that wallet & water the rockery. Quite a bit for one evening so I'll write no more now & drop this in the mail on my way to bus.

## Defendant's Exhibit A-4—(Continued)

Tomorrow I go to the dentist again—what a life.

Write me all the news & something more, honey, cause it's awfully hard to wait for you. I sure love you, darling, & I will but I hope it isn't a long time.

Love,

/s/ VERNE.

[Letterhead Fall & Son]

[Envelope postmarked]: Seattle, Wash., May 13,  
6:30 p.m., 1947.

Via Air Mail.

Ernest Verner

c/o U. S. Gen'l Accounting Office

Room 505 Welch Bldg.

Spokane 8, Washington.

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(Testimony of Ernest Verner.)

Mr. Turner: The letter is postmarked May 13, 1947, addressed to Ernest Verner, c/o United States General Accounting Office in Spokane.

“Dear Punkin

Received your cute letter this morning & was very much relieved to know you arrived safely. You made good time too. Next time it's going to be a one-way trip & no return ever!!! I'm lining up all kinds of ideas for us & they are just waiting for your arrival to sort out & decide on. There surely are a lot of things that we can do & I know we'll be a success at [158] it too.

(Testimony of Ernest Verner.)

"I couldn't talk to Ray yesterday as I told you in my letter last night. I just called him & as she was there he couldn't talk & asked me to phone him at home tonight so I'll see then what he has to say.

"I saw J. W. Maxwell in the bank today & he stopped and talked to me for a few minutes. Said Geo. Bringoff was retiring Sept. 1st & they wanted him to retire also & he said he told them to go to hell & those are his exact words. I thought I'd die laughing. Said he'd put it up to a public vote if they tried to force it & he knew he'd win too. He wished me a lot of luck in whatever I do & said it was nice to see me looking so well. What do you know about that? Also said there were a lot of things happening down there.

"Well I've got to dash home & try & sell the refrigerator & make that wallet & water the rockery. Quite a bit for one evening so I'll write no more now & drop this in the mail on my way to bus. Tomorrow I go to the dentist again—what a life.

"Write me all the news & something more honey cause it's awfully hard to wait for you—I sure love you darling & I will but I hope it isn't a long time.

"Love, Verne."

Q. Mr. Verner, will you state whether Mrs. Thornquist ever come out to your home and created scenes after you [159] returned to Mrs. Verner?

A. She did.

Q. How many times?                      A. Several.

Q. Give the jury some idea of it. I have said



(Testimony of Ernest Verner.)

a scene. The jury doesn't know what a scene is unless you tell them.

A. She pounded on the door, trying to gain admittance and she pounded on the door so hard that her hands cracked and there was blood on the door. She kicked dents in the door that are still there.

Q. Did she say anything or cry out or anything of that sort?      A. Yelling and screaming.

Mr. Evans: I object to that as being hearsay.

The Court: Do not say what she said. Otherwise you may answer the question.

Q. Give the jury some notion of it.

A. Just yelling and screaming.

Q. How about incidents in the car? Did she ever chase you or follow you or try to do any physical damage while you were driving your car?

Mr. Evans: I object to this line of testimony once more. I hate to take up the time with continuous objections, but this is all immaterial to the issues [160] in this case, as I believe Your Honor commented last night. It has no bearing upon the issues in this case and I can see no reason for going into the conduct between Mrs. Thornquist and this defendant. It is not within the issues of this case.

The Court: What the Court said last night was with respect to what was then before the Court. The objection is overruled.

A. Yes, she chased us around in the car several times.

(Testimony of Ernest Verner.)

Q. Was that simply following, or was there ever physical contact with your cars?

A. She did, she hit it head on.

Q. Where was that?

A. Between Western and First at Denny Way.

Q. Right here in Seattle?

A. That's right.

Q. Was Mrs. Verner with you at that time?

A. She was.

Q. Shortly before you mailed this letter which is charged in the indictment, did you have another one of these agreements that this was all broken off?

A. That's right.

Q. Will you tell the jury what happened at that time and when it was?

A. Whether it was Sunday, whether Sunday was the 23rd [161] or 24th of October, 1948—I don't know whether Sunday was the 23rd or 24th—we decided to call it all off and go our own separate ways.

Q. Who called who?            A. She called me.

Q. Where were you?

A. At the market.

Q. And what did she say?

A. She wanted to see me.

Q. Did you go to see her?            A. I did.

Q. What did she want then?

A. She wanted to be taken over to her cousin's.

Q. Where is that?

A. Merritt, Washington, about 14 miles this side of Leavenworth.

(Testimony of Ernest Verner.)

Q. Did you take her? A. I did.

Q. How long did the drive take?

A. From about eleven o'clock Sunday to about four-thirty in the afternoon.

Q. What was said between you and Mrs. Thornquist in general briefly?

A. Decided to call it all off, each go our own separate ways. [162]

Q. What was her emotional condition during that drive?

A. Crying, her famous act, hysterical all the time.

Q. During any of that time, was she pleading with you again to leave Mrs. Verner?

A. Yes.

Q. What did you say to that? A. No.

Q. At the conclusion, the agreement was that it was all to be called off and you were each to go your own separate ways?

The Court: Don't lead the witness. Ask him what the agreement was.

The Witness: That was it, sir.

Q. When did you next hear from her?

A. The next noon, Monday.

Q. What happened then?

A. She called me at the market and told me she had a different idea.

Q. Did she say what it was, or say what she had done? A. No, sir, she never did.

Q. Do you recall her exact words?

(Testimony of Ernest Verner.)

A. That she just had a different idea to the problem.

Q. At the time you mailed the letters charged in the indictment, you also mailed Mrs. Thornquist a copy of the same letter, did you? [163]

A. I did, sir.

Q. Have you heard from Mrs. Thornquist since then?      A. Several times.

Q. And what did she want?

A. A statement or an affidavit whichever you want to call it, stating that the charges in the letter were untrue.

Q. Was there anything else she wanted on any of her calls?      A. Yes, sir.

Q. What else did she want?

A. I think if I answer that, it would be very embarrassing to His Honor. If he still wants me to answer that question, I will answer it.

Q. Was it on the subject of whether or not she wanted you wanted to associate with her further?

A. She did.

Q. What were you trying to accomplish by the mailing of the two letters charged?

Mr. Evans: That is objected to as being irrelevant and immaterial. The question is whether or not these letters are lewd, lascivious and filthy. What he was trying to accomplish is not within the issues of this case.

The Court: Overruled.

(Testimony of Ernest Verner.)

A. On that Sunday in October when we definitely [164] decided to come to an end on it, I told her once and for all I would expose her as to just what she was and that was what I tried to accomplish. Everything else had failed, the courts had failed, everything else had failed.

Q. Has any libel suit been served on you or started against you by Mrs. Thornquist?

A. No, sir.

Cross-Examination

By Mr. Evans:

Q. You have read that exhibit, I believe?

A. I have, sir.

Q. I will ask you whether or not your signature appears thereon? A. It does, sir.

Q. I understand you now dispute the language in paragraph 2 and the second sentence in paragraph 3, is that correct?

A. That is right, sir, the interpretation of it, yes, I do.

Q. The rest of it you have no objection to?

A. I presume you are referring to the last three paragraphs?

Q. All the rest of the letter.

A. That's right. [165]

Q. The rest of it is all true?

A. Yes, sir. I wrote the letters, I mailed them.

Q. You wrote the letters and you mailed them?

A. I did, sir.

Q. You knew you shouldn't?



(Testimony of Ernest Verner.)

A. Yes, sir, I did.

Q. Do I understand you also mailed a copy of this letter to Mrs. Thornquist?

A. I did, sir.

Q. Who else did you mail letters to, carbons of this letter?

Mr. Turner: I object to that, Your Honor. That has already been ruled on.

The Court: The present objection is overruled. This is cross-examination. You should confine it to the persons now named.

Mr. Evans: They have opened up the subject that he mailed this identical letter, carbons of it, to other people. I think I have a right to determine what other people, how many other people.

The Court: I do not recall that. The objection is sustained unless you confine it to the persons named.

Mr. Evans: Your Honor, I have a right to show other identical offenses. [166]

The Court: The objection is sustained. You may inquire concerning the persons named in the statement which are there now included in the statement admitted and which is now in evidence.

Q. How many copies of this letter did you make?

Mr. Turner: Same objection and also that it is immaterial, the number of copies he made.

The Court: The objection is sustained.

(Testimony of Ernest Verner.)

Q. Are three copies of this letter all that you mailed?

Mr. Turner: Same objection, Your Honor.

The Court: That objection is sustained.

Q. Will you state whether or not your signature appears on Exhibit 3? A. It does, sir.

Q. Will you state whether or not your signature appears on Exhibit 5? A. It does, sir.

Q. When was the last time you talked to Mrs. Thornquist?

A. March 14th of this year, 1949.

Q. You haven't called her or talked to her since then?

A. I met her on the street on Fourth Avenue April 30th. She called me March 14th.

Q. As a practical matter, you have been calling her and seeing her until the last week, haven't you? [167] A. I have not, sir.

Q. You are absolutely certain of that?

A. Positive.

Q. You have had absolutely no communication with her since April 30th, is that what you want this jury to believe? A. I do.

Q. You haven't called her?

A. I have not, sir.

Q. She hasn't called you? A. No sir.

Q. And you state that to be the absolute truth?

A. The absolute truth and emphatically.

Q. Have you been to her house since that time?

A. No sir.

(Testimony of Ernest Verner.)

Q. You have been near her premises for the purpose of going on her property since then?

A. No sir.

Q. As I understand Defendant's Exhibit A-2, you received that on or about December 24th, 1945 is that correct?

A. That is right, when I returned from California, yes sir.

Q. As I understand it, you had gone to California to escape from Mrs. Thornquist, is that correct?

A. That is right.

Q. As I understand it, you were so determined to [168] escape from her that approximately a week after you received that letter, you started living with her for a period of about three months?

A. I got this letter on the 24th although it is postmarked the 4th.

Q. As I understand it, starting in January 1946 for about two or three months you were living with Mrs. Thornquist?

A. December 31, 1945, that is right sir.

Q. You were so anxious to escape from her that you moved in with her?

A. That's right, sir.

Q. Mrs. Thornquist was married?

A. Yes.

Q. You knew she was married? A. Yes.

Q. Her husband was overseas?

A. That's right.

Q. In the Armed Forces?

(Testimony of Ernest Verner.)

A. That's right.

Q. You were not in the Armed Forces, were you?

A. No sir.

Q. And as I understand it, you had sexual relations with her?

A. Yes sir.

Q. While her husband was overseas? [169]

A. That's right sir.

Q. You were married at the time?

A. That's right.

Q. What was the date that you first went out with Mrs. Thornquist?

A. November 27th.

Q. Of what year?

A. 1944.

Q. And from then on, that relationship was continued some period of time?

A. That is right.

Q. Even up through 1948 you were still endeavoring to get loose from Mrs. Thornquist, is that correct?

A. That's right, sir.

Q. Trying so hard that you drove her to Leavenworth, spent four or five hours driving up to Leavenworth with her?

A. That's right, sir.

Q. Very difficult, wasn't it?

A. It was.

Q. Did you have anything to do with persuading her to decide to divorce her husband?

A. I did not, sir.

Q. How did it come to your attention?

A. That she was divorcing her husband?

Q. Yes. [170]

A. She told me so.

(Testimony of Ernest Verner.)

Q. I believe you testified that at one time you had decided to marry Mrs. Thornquist?

A. At one time I had, yes sir.

Q. Of course she would have to be divorced from her husband before you could marry her, wouldn't she?

A. That's right.

Q. So at one time at least you would have been pleased to learn she was going to divorce her husband, isn't that correct?

A. I presume you could interpret it that way, yes, in 1946.

Q. As I understand it, Mrs. Thornquist was causing you so much trouble you were having such a difficult time to escape from her, that you took her over to Spokane, stayed with her at the Davenport Hotel, is that right?

A. That is correct, those dates, places and times are actually correct.

Q. All set out in this letter?

A. That is right.

Q. All this was done in an effort to escape from her?

A. That's right, sir.

Mr. Evans: No further questions. [171]

### Redirect Examination

By Mr. Turner:

Q. Will you state whether or not you were disturbed emotionally about this conflict, the relationship between Mrs. Thornquist and yourself and that between yourself and your wife?

A. Yes.



(Testimony of Ernest Verner.)

Q. While you were in California during the year 1945, did you consult a psychiatrist?

A. I did.

Q. Did he give you advice as to whether or not you should return to Seattle? A. He did.

Mr. Evans: I am going to object to this line of testimony. It was not covered on direct examination prior to this.

The Court: That is sustained.

Mr. Turner: The only pertinence of it, Your Honor, is that counsel on cross-examination asked a sarcastic question of Mr. Verner, saying that on his return from California he was so anxious to escape from Mrs. Thornquist that he moved in with her.

The Court: The objection is sustained.

Q. After you decided to try to break up with Mrs. Thornquist, did you ever try the expedient of just ignoring [172] her? A. I have.

Q. How did that work? A. No good.

Q. What would be the result of it?

A. She would be right down at the office.

Q. Or at your home? A. That's right.

Q. Has she ever telephoned there at unreasonable hours of the night? A. That is right.

Q. Give one example of that.

A. Around two o'clock in the morning she would call.

Q. What was the occasion of that call?

Mr. Evans: I am going to object to this. The

(Testimony of Ernest Verner.)

question wasn't covered in the original direct examination.

The Court: Was it touched upon in the cross?

Mr. Evans: Not that I know of.

Mr. Turner: Yes.

The Court: How?

Mr. Turner: By implication. Counsel asked quite a series of questions, containing a great deal of sarcasm, the fact that he is so anxious to escape from her all this time that he is having something to do with her continually. This is an explanation of that. [173]

The Court: The objection is sustained.

Mr. Turner: That is all except for an offer, Your Honor.

Mr. Evans: No further questions.

Mr. Turner: I have no other matters except to make my offers.

The Court: The jury will temporarily retire.

(Jury retires.)

Mr. Turner: I ask the reporter to read my previous offer of proof.

(Offer read by reporter.)

Mr. Turner: Your Honor, I find on further conversation with Mr. Verner that he did not personally receive the call and that the call was received by Mrs. Verner.

The Court: With what result so far as your offer of proof is concerned?

(Testimony of Ernest Verner.)

Mr. Turner: I would have to offer to prove it by Mrs. Verner, that:

Mrs. Thornquist called at two o'clock in the morning and carried on in a highly emotional state, screaming into the phone and asking what Mrs. Verner had done with Mr. Verner's body, "Where is he and can I see him again?" and words to that effect. That is all the offer.

The relevancy of the offer is to demonstrate what did happen when he tried to leave her alone. In this same telephone conversation, Mrs. Thornquist wanted to know when she could see him and where he was and all about him. It was a very emotional and hysterical call at two o'clock in the morning.

The Court: That involves the question of amount. The Court has already indulged what the Court thinks is considerable latitude in offering this type of evidence. What is the purpose of it?

Mr. Turner: Well, it is only to repel the inference contained in Mr. Evans' questions, and to have a basis in the testimony to reply to the argument I expect Mr. Evans will make to the jury, that here he is continuing to go with her for a long period of time after he says he attempted to break off, and on the face of it without the full picture, it does look incongruous.

The Court: On what issue do you make the offer?

Mr. Turner: To show that it is in support of Mr. Verner's general statement that he had tried everything else and it had failed to work.

(Testimony of Ernest Verner.)

The Court: What issue in the case does that relate to? [175]

Mr. Turner: On the intent in mailing the letters, he tried everything else and it failed to work. Finally he wrote these letters hoping that by exposing her he could expose her and be rid of her.

The Court: Is there any objection to this offer to call Mrs. Verner to the stand for the purpose of making this proof which he now offers?

Mr. Evans: Yes, I certainly do object to that, Your Honor. There is certainly no excuse and no defense to this action here for the defendant to show that he was taking the law into his own hands and committing an illegal act for some private purpose of his own and that is exactly what they want to show, that he became mad and disgusted for some reason or other so he took the law into his own hands and put these letters into the mail. Certainly that is no defense.

The Court: The order in which the proof is to be made gives the Court some added concern. If the offer was as to evidence which the witness on the stand might give, the situation might be somewhat different than that of calling another witness who has already been excused from the stand, respecting an offer of testimony which is inspired by cross-examination of a witness who is presently on the stand. [176]

The Court is inclined to overrule this objection as to this particular offer of proof and allow the

(Testimony of Ernest Verner.)

witness, Mrs. Verner, to be recalled for the purpose of this inquiry, making this offer of proof.

Mr. Turner: Before the jury is recalled, I ask the reporter to read my offer of proof as to Mrs. Verner as to which objection was made and sustained yesterday.

(Offer read by reporter as follows:

“I offer to prove by the witness, Margaret Verner, that in a conversation on the telephone early in Mrs. Verner’s knowledge of Mrs. Thornquist, Mrs. Thornquist made the statement that she was going to take her husband, Mr. Verner, away from her, Mrs. Verner.

“I also offer to prove by the witness, Mrs. Verner, that subsequently and at about the time of the institution of this divorce proceeding—probably slightly before, I am not advised of the precise date but it is approximately at that time, some time in 1945, the latter part of 1945—Mrs. Thornquist in the company of her own mother, Mrs. Dexter, called at the Verner home and in the presence of the defendant and Mrs. Verner, Mrs. Thornquist made a demand upon Mrs. Verner to give up her husband so that she, Mrs. Thornquist, could marry him.”) [177]

The Court: On what theory do you make those offers referred to now?

Mr. Turner: That Mrs. Thornquist was the aggressor, and it is just part of the general picture of harassment and pursuit which finally culminated



(Testimony of Ernest Verner.)

in this action of the defendant in trying to expose her and thus be rid of her.

The Court: The aggressor aspect of the case is not one of the issues which the government has to establish by the evidence beyond a reasonable doubt.

Mr. Turner: It bears on the matter of intent, Your Honor.

The Court: Is there anything further to be said regarding these offers?

Mr. Evans: I have nothing further.

The Court: The objection previously made and now made is overruled and you may make the proof in these three offers.

Is that all the offers now that you wish to make?

Mr. Turner: Yes, Your Honor.

The Court: Is there anything else you wish to take up in the absence of the jury?

Mr. Turner: Your Honor asked yesterday about the Musgrave case and in view of that, I presume that Your Honor would want to know about subsequent treatment of [178] that case in the Circuit Court of Appeals for the Ninth Circuit.

The Court: What is the citation of the Musgrave case?

Mr. Turner: That was 160 F. 700, and the language that Your Honor referred to on 706. I looked it up in the citator and found that the Ninth Circuit had cited that case in the case of Magon vs. United States, 248, F. 201 at p. 203.

The Court: Any other citations?

(Testimony of Ernest Verner.)

Mr. Turner: At page 203 where the Musgrave case is cited, it is cited with other authorities supporting the general rule for which defendant contends; namely, that the tendency to deprave and corrupt is an essential part of the charge, whether or not the Ninth Circuit Court of Appeals intended by that to merely cite authorities bearing on the point or whether that is intended by them to say that they approve only so much of the Musgrave case as supports that view, is a matter of opinion, but definitely the language on page 706 of the Musgrave case is contrary to what the Ninth Circuit has said. That is the point I wanted to call to Your Honor's attention.

The Court: Is there anything else?

Mr. Evans: I presume I will have an opportunity to [179] answer counsel and correct a misquotation of that case.

The Court: Yes, and if I forget to extend that opportunity, will counsel remind me of it?

Mr. Evans: I certainly will, Your Honor.

The Court: Is there anything else respecting offers of proof or proceedings in respect to this trial which should be taken up in the absence of the jury?

Mr. Turner: No, Your Honor.

The Court: Bring in the jury.

(Jury returns.)

The Court: All jurors have returned to their

(Testimony of Ernest Verner.)

places as before the temporary excusing of the jury.  
All are present.

Do you wish to ask of the witness, Verner, any further questions?

Mr. Turner: No further questions, Your Honor.

Mr. Evans: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Turner: I will call Mrs. Verner. [180]

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## MARGARET VERNER

recalled as a witness by and on behalf of defendant, having been previously duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Turner:

Q. Mrs. Verner, did Mrs. Thornquist at any time, and you will fix the time, tell you on the telephone or make any statement with reference to whether or not—or to what her intentions were with respect to your husband?

A. Yes, she did, many times.

Q. The first one when she said that, when was it and what did she say?

A. Well, it was about a year before they had ever been out together. She said “Your husband is so good to you and I am afraid—or I hope my husband will be that way to me when he comes back

(Testimony of Margaret Verner.)

from overseas." Then she kind of laughed and says, "I think I'll take your husband away from you."

Q. Shortly before the divorce started, did you receive a personal call at your home from Mrs. Thornquist and her mother? A. Several.

Q. At any time did she make a demand upon you to give up your husband so that she could marry him? A. Yes. May I say what she said?

Q. Yes.

A. She said that if I didn't give him up that she would plaster our names over every newspaper in the country.

Q. When was this statement?

A. Many times, to myself and to others.

Q. I am talking about a particular one.

A. This was in December, just before we went to San Mateo in 1945.

Q. And then you and Mr. Verner went down there together to San Mateo? A. Yes.

Q. Did you receive a call from Mrs. Thornquist at about two o'clock in the morning on one occasion?

A. Yes, several occasions.

Q. About when was that?

A. Well, she called several times the night before and during preceding our departure for San Mateo.

Q. This time I am referring to is the one you told me about, which you described, a very emotional carrying on over the telephone. Do you recognize the one I refer to?

(Testimony of Margaret Verner.)

A. I think you refer to the time that she called up and said that my husband was supposed to have taken her out [182] and instead of that we had gone to an Eastern Star dance, so she said that she had told him to come on or he was going to commit suicide. He was to cut his wrists with a razor blade and she wanted to know what I had done with his body.

Then when daylight came, she called at six and I told her he was asleep. She says, "What have you done with his body"? I said he was in bed so she came out at seven bringing some man with her and demanded to see his body. He was asleep and he heard the pounding on the door and he came dashing to the front door to see what was going on. He had his bathrobe on. I said she demanded to see his body, which of course made it rather silly, but then that was just the beginning. She was out there four times that day.

Mr. Turner: You may cross-examine.

Mr. Evans: I have no questions.

The Court: You may step down.

(Witness excused.)

The Court: Call defendant's next witness.

Mr. Turner: Defendant rests.

The Court: Is there any rebuttal?

Mr. Evans: Recall Mr. Mein. [183]



## BERNARD MEIN

recalled as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Evans:

Q. Mr. Mein, I believe you have been in the court room and heard Mr. Verner's testimony in regard to what he says you told him as to the seriousness or lack of seriousness of the investigation you were making?      A. I did.

Q. Was what he has stated a true account of what took place at the time of that interview?

A. No.

Q. What, if anything, did you tell him in regard to the nature of the investigation you were making?

A. When he came in the office, I advised him it was a violation of the law and warned him he didn't have to make any statements or admissions of any kind and that anything he said could be used against him in Court.

Q. What, if anything, did you state in regard to the seriousness or lack of seriousness of the offense?

A. I told him it was a violation of the law and I did [184] not say it was routine.

Q. As I understand it, you made no statement to the effect that it was a routine investigation?

A. I did not.

Mr. Evans: No further questions.

Mr. Turner: No questions.

(Testimony of Bernard Mein.)

The Court: You may step down.

(Witness excused.)

Mr. Evans: The government has no further testimony.

The Court: I understand the plaintiff rests?

Mr. Evans: The plaintiff rests.

The Court: Is there anything further on the part of the defendant?

Mr. Turner: Nothing further, Your Honor.

The Court: Defendant rests.

The court will during the noon hour need some time to discuss requested instructions with counsel. The jury is excused until two o'clock and may now retire.

(Jury retires.)

Mr. Turner: If the Court please, I would like to present a challenge to the sufficiency of the evidence.

The Court: You may do so.

Mr. Turner: Defendant challenges sufficiency of the evidence and moves for a directed verdict of acquittal. [185]

The Court: The challenge is overruled and the motion is denied.

Court will be recessed until two o'clock. I ask counsel to attend with the trial judge in chambers for the purpose of considering the requested instructions.

(At 12:03 o'clock, p.m. Wednesday, July 13, 1949, proceedings recessed until 2:00 o'clock p.m. Wednesday, July 13, 1949.)

Seattle, Washington

July 13, 1949, 2:40 o'clock p.m.

The Court: May the record show call of the jury is waived and that all jurors are present and also all parties on trial with their counsel.

Mr. Evans: The record may so show.

Mr. Turner: Yes, Your Honor.

(Arguments made on behalf of plaintiff and defendant.)

The Court: Members of the jury, you have heard the testimony and the arguments of counsel. After the Court instructs you, you will retire to the jury room to consider your verdict.

In this case, there is one defendant, Ernest Verner, on trial before you on the two counts of the indictment. To the indictment and to each of the counts thereof, the defendant on trial has entered a plea of not guilty. This plea puts in issue every material allegation of the indictment and each count thereof on which the defendant is being tried and casts on the government the burden of proving the guilt of the defendant on trial by the evidence beyond a reasonable doubt. The defendant is not called upon to disprove the charges of the indictment nor to prove his innocence.

The indictment is merely the paper charge and formal accusation against the defendant, which he has had no opportunity to answer until this trial. The indictment is not to be considered by you as evidence in any sense against the defendant, and the fact that the indictment has been returned by the

Grand Jury is not to be considered by you in any way as evidence against the defendant of the truth of what it states.

The burden is always on the government to prove the defendant guilty by competent evidence beyond a [187] reasonable doubt, and that burden must be successfully met by the government before you can convict the defendant.

In this case you must consider separately each of the two counts of the indictment on which the defendant is being tried. As to those counts, you must decide the guilt or innocence of the defendant as to each count separately, and if you have a reasonable doubt as to any material allegation of the particular count or counts of the indictment, it is your duty to acquit the defendant as to such count or counts, but if under the evidence you have no such reasonable doubt concerning any such allegation, it is your duty to convict the defendant on each count as to which under the evidence you have no such reasonable doubt.

The defendant on trial as well as every defendant in a criminal case is presumed innocent of the charges contained in the indictment until he is proved guilty by the evidence beyond a reasonable doubt, and this presumption is one of his important rights, not to be ignored or lightly considered either by the Court or by the jury. It is one of the important rights which the law accords all persons accused of crime. It attaches to them and continues with them throughout all stages of the trial and

throughout all stages of [188] your deliberations until it has been overcome by the competent evidence in the case and until the guilt of a particular defendant has been established by the evidence beyond a reasonable doubt, notwithstanding the presumption of innocence with which the law clothes all accused persons. This applies to the defendant on trial here.

By the expression "reasonable doubt" is meant in law just what those words in their ordinary and every day use imply. They have no technical or legal meaning different from their ordinary meaning. A reasonable doubt is a doubt which is based upon reason, or is a doubt that is not unreasonable and not merely imaginary or capricious. It is such a doubt as if entertained by a person of ordinary prudence, sensibility and decision, he would allow to influence him in transacting the graver or more important affairs of life, causing him to pause and hesitate before acting thereon.

It must be a real and substantial doubt and it must rise out of the honest minded, common sense, consideration and application of the evidence in the case or from lack of evidence in the case. If from a fair and candid consideration of all the evidence, you can say upon your oath as jurors that you have an [189] abiding conviction of the truth of the charge to a moral certainty, then you have no reasonable doubt and should convict.

If you have no such moral convictions or if you entertain doubts for which sane and satisfactory



reasons can be assigned in your own minds, you must give the defendant the benefit of that doubt and find him not guilty.

If the testimony in this case in its weight and effect be such that two conclusions can be reasonably drawn from it, one favoring the defendant's innocence and the other tending to establish his guilt, then you should apply the presumption of the defendant's innocence and find him not guilty. Even though the evidence in this case should engender in your minds a strong suspicion of probability of guilt of the accused, still the defendant cannot be convicted unless you are satisfied beyond a reasonable doubt of his guilt.

In considering the evidence, I charge you that it is not sufficient for you to find merely that the evidence adduced is consistent with the theory of the defendant's guilt, but before you can find him guilty you must believe beyond a reasonable doubt that the evidence is inconsistent with his innocence and [190] inconsistent with every other reasonable hypothesis except that of guilt.

The law does not require the government to prove a defendant guilty beyond all possible doubt, as such proof in many cases would be impossible, but the government must prove the defendant guilty beyond a reasonable doubt as defined in these instructions.

A reasonable doubt may be created by lack of evidence or it may be created by the evidence itself. You are instructed that while a defendant at the

beginning of and during the trial is presumed to be innocent, yet if and when during your deliberations the proof shows his guilt beyond a reasonable doubt, then the presumption of innocence disappears from the case.

Count I of the indictment charges: "That on or about November 8, 1948, at Seattle, in the Northern Division of the Western District of Washington, Ernest Verner did knowingly deposit and cause to be deposited, for mailing, an envelope, addressed to Milton Fardon, c/o Ford Motor Co., 4141 - 4th Avenue, South, Seattle, Washington, containing a lewd, lascivious and filthy letter" in violation of the law referred to in that count.

The defendant has entered a plea of not guilty to that Count I of the indictment. This places [191] the burden upon the government to prove each and every material allegation in that count beyond a reasonable doubt.

The material allegations which the government must so prove in respect to Count I of the indictment are:

1. That the offense referred to occurred on or about November 8, 1948, in Seattle, Washington;
2. That the defendant knowingly deposited for mailing an envelope addressed to Milton Fardon;
3. That the said envelope contained a letter which was lewd, lascivious and filthy.

If by the evidence you are convinced beyond a reasonable doubt of the truth of each one of these three allegations, then it is your duty to return a

verdict of guilty in respect to Count I. If you are not so convinced beyond a reasonable doubt of the truth of each one of these three allegations, then it is your duty to return a verdict of not guilty on that count.

Count II of the indictment charges: "That on or about November 8, 1948, at Seattle, in the Northern Division of the Western District of Washington, Ernest Verner did knowingly deposit and cause to be deposited, for mailing, an envelope, addressed to Miss Evelyn Nelson, c/o Ford Motor Co., 4141 4th Avenue, South, Seattle, Washington, containing a lewd, lascivious and [192] filthy letter" in violation of the law referred to in that count, which is the same law referred to in the first count.

The defendant has entered a plea of not guilty to that Count II of the indictment. This places the burden upon the government to prove each and every material allegation in Count II beyond a reasonable doubt. The material allegations of that count which the government must so prove are:

1. That the offense referred to occurred on or about November 8, 1948, in Seattle, Washington;
2. That the defendant knowingly deposited, for mailing, an envelope addressed to Miss Evelyn Nelson;
3. That the said envelope contained a letter which was lewd, lascivious and filthy.

If by the evidence you are convinced beyond a reasonable doubt of the truth of each one of these three allegations in Count II, then it is your duty

to return a verdict of guilty on that count. If you are not so convinced beyond a reasonable doubt of the truth of each one of these three allegations, then it is your duty to return a verdict of not guilty on that count.

You are instructed that the statute referred to in the indictment provides insofar as is here material [193] that: "every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character is declared to be nonmailable matter and shall not be conveyed in the mails, and that whoever knowingly deposits for mailing or delivery, anything declared by this section of the statute to be nonmailable" shall be punished as provided in the statute.

The words "lewd" and "lascivious" as used in the statute signify that form of immorality which has relation to sexual impurity. By the word "filthy" is meant that which is nasty, dirty, vulgar, indecent, offensive to the moral sense and morally depraving and debasing.

The inquiry under the statute is whether the letter charged to have been lewd, lascivious and filthy was in fact of that character and is calculated to corrupt and debauch the mind and morals of those into whose hands it might fall, and if it was of that character and so calculated and was deposited in the mails by one who knew its contents, the offense is complete although the defendant himself did not regard the letter as one that the statute forbade to be carried in the mails.



A letter which is merely coarse, vulgar, disgusting, indecent or defamatory or a combination of all of these [194] would not be lewd, lascivious or filthy within the meaning of the Statute unless it was also calculated to corrupt and debauch the mind and morals of the addressee.

Unless you are satisfied beyond a reasonable doubt that the letter in evidence and described in Count I was lewd, lascivious and filthy as those terms are defined in these instructions, you will acquit the defendant on Count I.

Unless you are satisfied beyond a reasonable doubt that the letter in evidence and described in Count II was lewd, lascivious and filthy as these terms are defined in these instructions, you will acquit the defendant on Count II.

With reference to the contents of the letter, you are instructed that you should not judge it solely by one or more isolated words or phrases which considered by themselves might happen to be lewd, lascivious and filthy as defined to you in these instructions. You should on the contrary consider the dominant or controlling effect or character of the whole letter and judge its effect in connection with all of the issues disclosed by the evidence.

Intent is an ingredient of the crime. It is psychologically impossible for you to enter into the [195] mind of the defendant and determine the intent with which he operated. You must therefore determine the motive and purpose and intent from the testimony which has been presented, and you will



consider all of the circumstances disclosed by the testimony of the witnesses, bearing in mind that the law presumes that every man intends the legitimate consequences of his own acts.

Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent.

You are the sole and exclusive judges of the evidence and of credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of a witness, you have a right to consider his demeanor upon the witness stand, his apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the stories such witness relates, and the interest, if any, you may believe a witness feels in the result of a trial and any other fact or circumstance arising from the evidence which appeals to your judgment as in anywise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of [196] weight as in your judgment it is entitled to.

You will be slow to believe that any witness has willfully testified falsely in the case, but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely except insofar as the same may be corroborated by other credible evidence in the case.

The defendant having testified as a witness, the

foregoing relating to credibility of witnesses and weight of testimony applies to defendant and his testimony as well as to all the other witnesses in the case.

Evidence has been introduced tending to show defendant's good character in several respects. Good character reputation in the community where defendant resides is proper evidence, and its purpose and function is to strengthen the presumption of innocence of the defendant. You are instructed that evidence of good character of the defendant is to be considered by you regardless of whether the government's evidence against him be clear or doubtful, and such good character evidence, when taken alone or with the other evidence in the case, is to be considered by you in determining whether a reasonable doubt exists as to the defendant's [197] guilt.

Proof of good character is not of itself a defense if the jury is satisfied beyond a reasonable doubt that the defendant is nevertheless guilty, but proof of good character when considered by itself or with other evidence in the case may engender a reasonable doubt as to the defendant's guilt. Whether it does so in this case and what weight should be given such evidence are for you to determine from all the facts and circumstances of the case including the nature of the charge.

If after considering such good character evidence and the other evidence in the case, you entertain a reasonable doubt as to the defendant's guilt, it is your duty to acquit him, but if after such considera-

tion you are convinced by the evidence beyond a reasonable doubt of his guilt, you should find him guilty.

There are two counts in the indictment. Each count charges a separate and distinct crime. You are instructed that you should consider the guilt or innocence of the defendant as to each count separately. If you believe beyond a reasonable doubt that the defendant is guilty on Count I of the indictment, but is not guilty on Count II, then you should return a verdict of guilty as to Count I and not guilty as to [198] Count II. If you believe beyond a reasonable doubt that the defendant is guilty on Count II of the indictment but not guilty on Count I, then you should acquit the defendant as to Count I and find him guilty as to Count II. Likewise if you are convinced beyond a reasonable doubt that the defendant is guilty on both counts of the indictment, you should return a verdict of guilty as to both counts. If you are not convinced beyond a reasonable doubt that the defendant is guilty on either count of the indictment, then it is your duty to return a verdict of not guilty as to both counts.

In other words, you are not required to find the defendant guilty on both counts or not guilty on both counts, but you are required to render a verdict which truly reflects your findings as to the guilt or innocence of the defendant as to each of the two counts of the indictment.

You are instructed that the government does not desire to have you bring in a verdict finding the de-

fendant guilty unless the verdict is supported by the evidence beyond a reasonable doubt, but that neither does the government want a guilty defendant to escape.

It is the duty of the Court to instruct you as to the law governing you, and you must take such instructions of the Court to be the law. You will consider such instructions as a whole and will not select any one of them and place undue emphasis on that one instruction.

You will consider all the evidence admitted by the Court and now before you and you will disregard all evidence and exhibits offered but not admitted by the Court and all evidence stricken out by the Court.

In this connection you are instructed that you are not called upon to pass upon objections and exceptions made or taken by counsel and you should not allow the making of objections and taking of exceptions by counsel to influence you or confuse you in your deliberation, and in reaching a verdict you should act only upon the evidence which has been admitted and is now before you and the law as it has been given to you by the Court.

Statements if any by counsel or the Court unsupported by your own recollection of the evidence, you will disregard. Likewise you will disregard all statements made by counsel and the Court to each other during the trial.

While it would be proper for me as the trial judge to analyze the testimony and to give you my



understanding of it, which, however, would not be binding upon you, my purpose is not to intimate to you [200] any opinion I may have of any fact or the weight of any evidence and if I have referred to or if I do refer to any facts in the case, it will not be and has not been for the purpose of indicating any opinion I may have of the facts, but simply to illustrate some principle of law which is involved with the facts.

It is your duty as jurors to confer with each other freely and frankly about and to discuss together honestly the questions involved in this case for the purpose of agreeing, if you can honestly do so, upon a common verdict. In the end, however, the jury's verdict must be the verdict of each one and all twelve of you. A verdict representing the opinions of any lesser number is not a lawful verdict. The law does not contemplate that any one of you will surrender his or her own individual opinion about the guilt or innocence of the defendant so long as such one of you personally has a reasonable doubt about the matter. Regardless of what the opinions of your fellow jurors may be, as long as you have a reasonable doubt about the guilt of the defendant, if you have such reasonable doubt, it is your duty to vote for an acquittal.

If by the evidence beyond a reasonable doubt you are convinced of the guilt of the defendant as to one or more of the counts of the indictment, it will then be [201] your duty to convict the defendant on



such count or counts, if any, as to which you are so convinced.

In arriving at your verdict, you should not allow sympathy or prejudice to influence your judgment. If the defendant is guilty, no amount of sympathy will make him innocent. Likewise if the defendant is innocent, no amount of prejudice will make him guilty.

You are not concerned with what the punishment might be in the event you should return a verdict of guilty. The degree of punishment is a matter which the Court alone must decide. In other words, it is the duty of you as jurors to determine the facts of this case and it is the Court's duty unassisted by the jury to determine the amount or kind of punishment in the event a verdict of guilty is returned.

In this Court the instructions in written form are not sent to the jury room, also written transcripts of the testimony orally stated from the witness stand will not be sent to the jury room. It is for the jury to remember the evidence and the Court's instructions.

The indictment in this case will be sent to the jury room with you merely to show the paper charge against the defendant but is not to be considered as evidence. You will take with you to the jury room the exhibits in the case and this form of verdict which the [202] clerk has drawn up for your convenience. The verdict is in the usual form. As to each count on which the defendant is being tried,

before the word "guilty" is a blank space and you will write in that blank space in each instance the word "is" or the word "not" according as you find. It will require your entire number to agree on your verdict and when you have so agreed, you will cause your verdict to be signed by your foreman, whom you will elect from your number immediately upon retiring to the jury room, and return with your verdict into open court.

Counsel, have I overlooked anything? If there are any exceptions to be noted, I shall upon being so advised temporarily excuse the jury for that purpose as provided by the rule. Are there any exceptions to be noted?

Mr. Evans: I have no exceptions. I have a suggestion, however, Your Honor.

Mr. Turner: The defense has some exceptions, Your Honor.

The Court: The Court is not yet ready to submit the case to the jury for its decision, and you will, during the next temporary absence from the jury box, withhold your decision and continue to withhold discussion of this case. Later on, after having been [203] again called back to the jury box, this case will be submitted for your decision, but it is not being done now, so withhold your decision until the Court later advises you. You will now temporarily retire to the jury room.

(Jury retires.)

Mr. Evans: The second paragraph of the defendant's requested Instruction No. 2, which I believe

the Court read—initially the Court was not going to give that second paragraph, but I understand the Court later decided to give it. The very last word in that second paragraph, the word “addressee” is strictly against the previous rulings of the Court in this case.

I believe that the words “of any person into whose hands a letter might fall” are the proper words to be used. It has already been read to the jury with the term “addressee” used.

The Court: “Calculated” is for the determination of the jury. It is not for the determination of the addressee or the defendant.

Mr. Evans: I believe the proper words in the place of “addressee” is “morals of any person into whose hands that would fall.” That, I believe, conforms to the previous instruction on the definition of the terms lewd, lascivious and filthy, but to put this in there makes a conflict in the instructions.

The Court: Where is the conflict?

Mr. Evans: In the Court’s instruction—I don’t know the number the Court gave to it—but the instruction defining the term lewd and lascivious, I believe the Court ended that with “calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.” Then the Court follows with this instruction which is entirely different.

The Court: I believe that addressee is included in the phrase “into whose hands it might fall.”

Mr. Evans: Yes, it includes addressee but the

Court in this defendant's requested Instruction No. 2 has turned around and limited what has formerly been stated as any person into whose hands it might fall.

The Court: I believe that correction should be made.

Mr. Evans: I offer that as a suggestion, Your Honor.

The Court: I will consider that further.

Mr. Turner: If the Court please, the defendant excepts to that portion of the instruction on the presumption of innocence which says in substance that the presumption disappears when during the deliberations of the jury—I am not sure I heard the Court correctly.

The Court: You are instructed that while the defendant at the beginning of and during the trial is presumed to be innocent, yet if and when during your deliberation the proof shows his guilt beyond a reasonable doubt, then the presumption of innocence disappears from the case.

Mr. Turner: Defendant excepts to that instruction on the ground that it is confusing—while without more study than I have been able to give it, it might be technically correct, I am afraid that it might lead the jury to believe that after they get into their deliberation that presumption disappears. It does not say so in those words but I am afraid it is confusing and I except to it on the ground that it is confusing.

The Court: Allowed.

Mr. Turner: The defendant excepts to the refusal to give defendant's Instruction No. 3 related to a letter addressed to a definite person, that there is no presumption that the letter will fall into the hands of any person other than the addressee of the letter. I have not quoted it precisely but it has been submitted in writing. Your Honor recognizes the instruction, defendant's requested Instruction No. 3.

I had better read it:

"You are instructed that if a letter is addressed to a definite person and deposited in the United States [206] mail for delivery to that person, there is no presumption that the letter would fall into the hands of any person other than the addressee of the letter."

The Court: I wish you would show me the case and the language of the case that rules in support of that request.

Mr. Turner: If the Court please, the case is *United States vs. Wroblenski*, 118 F. 495, at page 496, and the language is quoted in my brief, on page 6, submitted to the Court at the beginning of the trial.

The particular language I rely on is this:

"In the case of a private letter (sealed) there is no publication . ."—citing the case—"and no presumption arises of intention to give publicity, or that it will be read by other than the addressee."

The Court: What is the purpose of that statement?



Mr. Turner: Well, I think it follows from that, that we get right down to the fact that where there is a sealed letter addressed to a given party and no evidence that there was anything done by the defendant or at his instigation or suggestion to circulate it elsewhere and there is no evidence that it was circulated elsewhere, when the jury's attention is confined to determining whether or not the letter was calculated [207] to corrupt and deprave and debauch the morals of the addressee.

The Court: Mr. Evans, have you any authority to the contrary?

Mr. Evans: If the Court is going to give that instruction, then the government should be entitled to introduce its testimony that three other carbons of this letter were sent to other persons, which will show this was published just like a newspaper, scattered and broadcast. If that instruction is given, then the government certainly should have had the opportunity to have presented that information.

The Court: You have evidence in now, Mr. Evans, of both Miss Nelson and Mr. Fardon receiving the same letters.

Mr. Evans: The government was precluded from putting in the evidence that there were three more carbon copies sent to other people. I might explain why the indictment was not drawn on those others, those people destroyed them before we could have brought them in to testify they received the letters. There is no need of presenting five counts in the indictment when two is enough.

The Court: The Court had a different theory than that for sustaining the objection to the language which [208] was deleted from the statement which is in evidence as Plaintiff's Exhibit 1.

The Court was trying to avoid all possible collateral issues in the case, it being the thought of the Court that they would have introduced the possibility of further collateral testimony. In other words, if the plaintiff's evidence was going to mention separate mailing, then the defendant would have been properly allowed to introduce rebuttal testimony.

Mr. Evans: May I address the Court further?

The Court: I am considering the propriety—I have not decided upon the propriety or lack of it. I am considering the propriety of giving that instruction, No. 3 which is now the subject of discussion, and also to strike the giving of that instruction which Mr. Evans spoke of and to give it in different form, strike the word “addressee” in line 17 on that page on which defendant's requested Instruction No. 2 is written and insert in lieu thereof “Those into whose hands it might fall,” it referring to a letter.

If I make the correction suggested by Mr. Evans, I would be more inclined to give that requested instruction No. 3. I will say this on further deliberation, Mr. Evans, I do not think there is any actual conflict between the word, addressee, in line 17 and the phrase, those into whose hands it might fall. The only difference between those two expressions

is that using the phrase, the addressee, confines it to the person to whom it is mailed, that person being among those into whose hands it might fall.

I am inclined to grant the request of Mr. Evans to make that amendment, and it will have to be done by striking the paragraph of the instruction given and substituting the paragraph amended, but if I do that, I will be very likely to then add the defendant's requested Instruction No. 3 and also to decline the request of Mr. Evans to reopen the case for further testimony concerning collateral matters if No. 3 is given. I am leaving the question there involved in your request as to No. 3, Mr. Turner, for further thought. Are there any other exceptions which you wish to note?

Mr. Turner: Defendant excepts to the refusal of the Court to give the first paragraph of the defendant's requested Instruction No. 4, as I understood it Your Honor refused the first paragraph and gave the second.

The Court: That is correct.

Mr. Turner: The first paragraph reads as follows:

"You are instructed that the purpose, object and effect of a letter is to be judged by you from its contents as a whole and from the circumstances of its mailing, including the identity of the addressee, if any, his background, age, experience, position and interest, if any, in the subject matter of the letter."

That request is based on the philosophy and rea-

soning set forth in the case of—it is the Dennett case in 39 F. (2).

The Court: I wish the record to show the reason I omitted the first paragraph of Instruction No. 4 is because I think it is covered in the last sentence of the second paragraph which the Court did give.

Mr. Turner: I think it is in part covered, but it is not all covered because the second paragraph of that requested instruction confines attention to the document, and the first paragraph calls attention to the other elements which I think are proper considerations.

The Court: After the word, circumstance, at the end of the next to the last line, you wrote in your requested form, I have stricken the words following that; namely, “as above mentioned” and inserted in lieu thereof “disclosed by the evidence.” It makes it much broader than those words stated in your first paragraph.

Mr. Turner: Thank you, Your Honor. I had not [211] appreciated that.

The Court: So I am not confined to the whole letter in connection with all of the circumstances enumerated in the first paragraph of your requested form, but it is all of the circumstances disclosed by the evidence in the case. Your exception to that is allowed if you have finished your statement. If you have not, you may continue.

Mr. Turner: Nothing further on that. I had not appreciated that point, Your Honor.

The Court: Your exception is allowed. I explained to you what was done.

Mr. Turner: The case referred to is *United States vs. Dennett*, 30 F. (2) 564.

The defendant excepts to the refusal of the Court to give requested instruction No. 5 which reads as follows:

“If the purpose, object or effect of a letter is to give information to the addressee in which the addressee would have a legitimate interest, rather than to corrupt or deprave the morals of the addressee, then you are instructed that the purpose, object or effect is not unlawful and its mailing would not constitute a violation of the Statute.”

The Court: That involved a question of whether the *Musgrave* case is still the law, does it not?

Mr. Turner: If Your Honor please, I am embarrassed at answering that question because there are portions of the *Musgrave* case which are still the law as quoted in——

The Court: By my question, I meant the decision in the *Musgrave* case on that point.

Mr. Turner: I don't feel that the *Musgrave* case is inconsistent with that, even if it were still the law. It is something that is hard to distinguish. It is my theory that on the objective test, the document considered in the light of circumstances as disclosing a purpose, object or an effect is material and that the instruction is proper.

The Court: Exception allowed.

I advise counsel that upon recalling the jury and the jury taking their position in the jury box, I expect to make the correction requested by Mr.



Evans and I also expect to give defendant's requested instruction No. 3.

Mr. Evans: May I be heard as to No. 3?

The Court: Yes, you may.

Mr. Evans: I can see no authority in the case which counsel has cited as to any presumption one way or another, the very fact that this letter has fallen [213] into the hands of numerous people, at least 23 people in the grand jury, at least into the hands of the postal authorities, at least into the hands of this jury, certainly rebuts any presumption. I would like that to be explained to the jury, whether that is a presumption of law or a presumption of fact, and I don't think it is at all proper because these letters have fallen into the hands of many people. I can't see that there is any presumption that a letter addressed to a certain person will only be seen by that person, nor can I find any authority in the quotation cited here nor from the facts of this case that these letters or any other letters are presumed to be seen only by the person who receives them.

The Court: I am intending to strike the reading of that paragraph which the Court read as follows:

"A letter which is merely coarse, vulgar, disgusting, indecent or defamatory or a combination of all of these would not be lewd, lascivious or filthy within the meaning of the statute unless it was also calculated to corrupt and debauch the mind and morals of those into whose hands the letter might fall."

The words "those into whose hands the letter might fall" are not in the instruction as given but these two words were, "the addressee." I am going to strike the paragraph with the words "the addressee" and am going to give the paragraph in the form I stated a moment ago; namely, "morals of those into whose hands the letter might fall."

That is the way I am going to read it and then I am going to read Instruction No. 3. If counsel wish to take an exception, I wish them to understand that should they at this moment care to note the exception to the Court's doing these things or not doing something else, you may note it now with the same effect, let the record show, as if it be done after the Court does this in the presence of the jury and thereafter excused the jury for counsel to make further exception. Will that be satisfactory with counsel?

Mr. Turner: Yes.

Mr. Evans: Yes, Your Honor.

The Court: If it is done now it will have the same effect as if it be done after the Court makes these additions and corrections among the instructions to the jury and thereafter excuses the jury for the purpose of counsel noting exceptions. Does either side wish to note any exception to what the Court advises counsel will be done when the jury is brought back?

Mr. Evans: I don't believe I have any, Your Honor. [215]

Mr. Turner: The defendant has no exception.

The Court: Bring in the jury.

(Jury returns.)

The Court: Let the record show all jurors have returned to their places as before.

I wish the jury to be instructed that the Court wishes to and does now make one correction and one addition now. As to the correction, I am going to read the instruction which I gave which I wish to strike and then after I have stricken the instruction, I am going to read a correction of that same matter and the jury will regard it only in the final corrected form.

First, as relating to the correction, the Court does strike and the jury will disregard the following among the instructions already given:

A letter which is merely coarse, vulgar, disgusting, indecent or defamatory or a combination of all of these would not be lewd, lascivious or filthy within the meaning of the Statute unless it was also calculated to corrupt and debauch the mind and morals of the addressee.

Strike those words and do not pay any further attention to them in that form. Lay them out of your minds the same as if the Court had not stated them. [216]

In lieu of those words, the instruction touching that subject is to be regarded by the jury as follows, and this instruction on that subject will be the law governing the jury's action.

A letter which is merely coarse, vulgar, disgusting, indecent or defamatory or a combination of all

of these would not be lewd, lascivious or filthy within the meaning of the Statute unless it was also calculated to corrupt and debauch the mind and morals of those into whose hands the letter might fall.

All other instructions given by the Court will stand uncorrected but you will receive among all the others given the following added instruction.

You are instructed that if a letter is addressed to a definite person and deposited in the United States mail for delivery to that person, there is no presumption that the letter will fall into the hands of any person other than the addressee of the letter.

If there are any further exceptions to be noted, the Court will, upon being so advised, temporarily excuse the jury for that purpose. Are there any further exceptions?

Mr. Turner: Defendant has none, Your Honor.

Mr. Evans: No Your Honor.

The Court: The clerk will now swear the bailiff.

The jury will now retire to consider your verdict, being hereafter in the conduct of the bailiff. You will hereafter remain together at all times until discharged by the Court from further consideration of this case. The case is now finally submitted to the jury for its decision and verdict.

The jury will now retire.

(Jury retires.)

(At 4:30 o'clock p. m., Wednesday, July 13, 1949, trial proceedings closed.)

## CERTIFICATE

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,  
Official Court Reporter.

[Endorsed]: Filed September 23, 1949. [218]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision I of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 39(b)(1) of the Federal Rules of Criminal Procedure, I am transmitting herewith as the record on appeal in the above entitled cause, pursuant to designation of counsel, all of the original pleadings on file and of record in said cause in my office at Seattle, as set forth below, and that said



pleadings, together with the exhibits admitted in evidence at the trial of said cause numbered Plaintiff's exhibits 1-5 inclusive and Defendant's exhibits A1-A-4 inclusive, constitute the record on appeal from the Judgment filed and entered July 22, 1949, to the United States Court of Appeals at San Francisco, California, to-wit:

1. Indictment.
2. Court Reporter's transcript of Arraignment and Plea.
3. Motion by Defendant to Dismiss Indictment.
4. Motion of Defendant for Bill of Particulars.
5. Bill of Particulars.
6. Praeipe for Subpoena (Milton H. Fardon et al).
7. Praeipe for Subpoena for Witnesses (William Horton et al).
8. Marshal's return on Subpoenae (Fardon & Nelson).
9. Government's Requested Instructions.
10. Defendant's Requested Instructions.
11. Defendant's Memorandum of Authorities for use of the Trial Court.
12. Verdict.
13. Marshal's Returns on Subpoenae (McMillan, Horton & Gardner).
14. Motion for Judgment of Acquittal (Renewed) and Alternative Motion for New Trial.
15. Judgment, Sentence and Commitment.
16. Appeal Bond.
17. Three letters in reference to Defendant.

18. Notice of Appeal.
19. Stipulation to Extend Time for Filing Record on Appeal.
20. Motion to Extend Time for Filing Record on Appeal.
21. Affidavit of Theodore S. Turner in Support of Motion to Extend Time for Filing Record on Appeal.
22. Order Extending Time for Filing Record on Appeal.
23. Petition to Reduce Sentence.
24. Affidavit of Margaret Verner.
25. Court's Decision of Defendant's Petition for Reduction of Sentence.
26. Reporter's Transcript of Proceedings at Trial.
27. Designation of Record on Appeal.
28. Order Directing Transmission of Original Exhibits.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 20 day of October, 1949.

MILLARD P. THOMAS,  
Clerk.

[Seal] By /s/ TRUMAN EGGER,  
Chief Deputy.

[Endorsed]: No. 12388. United States Court of Appeals for the Ninth Circuit. Ernest Verner, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 24, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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In the United States Court of Appeals  
For the Ninth Circuit

No. 12388

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERNEST VERNER,

Defendant.

STATEMENT OF POINTS ON WHICH  
APPELLANT WILL RELY

The appellant will rely on the following points in this proceeding:

I.

That the indictment, considered amended by Exhibits 2, 3, 4 and 5, does not state facts sufficient to constitute a violation of Section 1461, Title 18, U.S.C., on either ground of said indictment, and

the District Court was in error in overruling the following motions timely made by the appellant:

1. Defendant's motion for dismissal of the indictment.
2. Defendant's motion for directed verdict.
3. Defendant's motion for judgment of acquittal (renewed) and alternative motion for a new trial.

## II.

The refusal of the Trial Court to admit the testimony of Milton Farden and Evelyn Nelson, as set forth in the offers of proof contained in the printed record, constituted an error and a denial of a fair trial to appellant.

/s/ ALLAN POMEROY and

/s/ ERNEST R. CLUCK.

Receipt of copy acknowledged.

[Endorsed]: Filed October 28, 1949.

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[Title of Court of Appeals and Cause.]

### APPELLANT'S DESIGNATION OF PORTIONS OF THE RECORD TO BE PRINTED

The defendant, Appellant, designates the following portions of the record to be printed:

1. Indictment.
2. Bill of Particulars.
3. Defendant's Motion to dismiss indictment.
4. Exhibits 2, 3, 4 and 5.

5. Judgment, sentence and committment.
6. Motion for judgment of acquittal renewed and alternative motion for new trial.
7. The following portions of transcript of testimony:

From line 6, page 60, to and including line 1, page 61.

From line 12, page 58, to and including line 21, page 58.

From line 16, page 61, to and including line 9, page 65.

/s/ ALLAN POMEROY and

/s/ ERNEST R. CLUCK,

Attorneys for Defendant,  
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 28, 1949.



[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now the United States of America, Appellee, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Vaughn E. Evans, Assistant United States Attorney, and designates that the entire transcript of the record, testimony and exhibits be printed as the record in the above entitled cause.

Dated at Seattle, Washington, this 31st day of October, 1949.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ VAUGHN E. EVANS,  
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed November 2, 1949.



UNITED STATES  
COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

ERNEST VERNER,

*Appellant*

VS.

UNITED STATES OF AMERICA,

*Appellee*

---

**BRIEF FOR APPELLANT**

---

APPEAL FROM THE UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

---

ALLAN POMEROY

ERNEST R. CLUCK

*Attorneys for Appellant*

304 Spring Street

Seattle, Wash.

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UNITED STATES  
COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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ERNEST VERNER,

*Appellant*

VS.

UNITED STATES OF AMERICA,

*Appellee*

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**BRIEF FOR APPELLANT**

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APPEAL FROM THE UNITED STATES DISTRICT COURT,  
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## SUMMARY STATEMENT

This is an appeal from a conviction in the District Court of the Western District of Washington, Northern Division, upon an indictment charging the appellant with knowingly depositing an envelope in the United States Mail addressed to one Milton Fardon of Seattle, Washington, containing a lewd, lascivious and filthy letter in Count I; and in Count II, charging him with similarly depositing an envelope containing a copy of said letter addressed to one Evelyn Nelson of Seattle, Washington, all in violation of Section 1461, Title 18, U. S. C., (U. S. C. A., Title 18, Sec. 334). On the 22nd of July, 1949, the defendant was sentenced to 12 months in a Federal Prison Camp.

## JURISDICTION

Violations of the above statute are cognizable only by United States District Courts, which have exclusive jurisdiction of crimes and offenses cognizable under the authority of the United States. The jurisdiction of the Court below was involked under the following statutes:

Section 546, Title 18, U.S.C.A.

Section 41-2, Title 28, U.S.C.A.

Section 371, Title 28, U.S.C.A.

The jurisdiction of this Honorable Court is invoked under the provisions of Section 225, Title 28, U.S.C.A.



## STATEMENT OF QUESTIONS RAISED

The charges of the indictment are made under the first paragraph of Section 1461, Title 18, U.S.C., (Title 18, U.S.C.A., sec. 334) which reads as follows:

“Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, printing, or other publication of an indecent character . . . is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit or cause to be deposited, for mailing or delivering, anything declared by this section to be nonmailable, or shall knowingly take or cause the same to be taken from the mails for the purpose of circulating or disposing thereof, or of aiding the circulation or disposition thereof, shall be fined not more than \$5,000.00 or imprisoned not more than five years or both.”

1. The first question raised on this appeal is this: Did the mailing of the letter (R. pp. 8 and 73-5) to the named addressees constitute a violation of the above statute and was the District Court in error in overruling the defendant's timely motion for dismissal of the indictment (R. pp. 6), his motion for a directed verdict for acquittal (R. pp. 78-9, 84), and his motion for judgment of acquittal and alternative motion for new trial (R. pp 40)?

2. The second question is whether the refusal of the trial Court to admit the testimony of the two recipients of the letters as to the effect the letter had upon them constitutes error and a denial of a fair trial to Appellant, Fardon (R. pp. 79, 92, 119, et seq.), Nelson (R. pp. 116).

## SPECIFICATIONS OF ERROR

No. 1: The District Court was in error in overruling the defendant's motion for dismissal of the indictment. (R. p. 6)

No. 2: The District Court was in error in overruling the defendant's motion for a directed verdict of acquittal. (R. p. 84)

No. 3: The District Court was in error in overruling the defendant's motion for judgment of acquittal and alternative motion for a new trial. (R. p. 40)

No. 4: The District Court was in error in sustaining an objection to the following testimony of the witness, Fardon (R. p. 79), to whom the letter was sent:

Q. When you received this letter, what effect did it produce upon you? State your reactions to the letter.

Mr. Evans: I am going to object to that. That is absolutely immaterial and irrelevant in this case. The only issue involved here is as to whether or not this letter was mailed by the defendant, whether or not it is lewd, lascivious and filthy, and those are the only issues involved.

Mr. Turner: It is evidentiary, bearing on the ultimate issue. I think Mr. Evans is right in stating that if he states it as the ultimate issue.

The Court: The objection is overruled.

Mr. Evans: May I address the court in the absence of the jury? \* \* \* \* \*

The Court: The Court is of the opinion that under these two cases cited by the Court, the one in 28 F. and 160 F. under the detailed citation which the Court has given counsel, this objection should be sustained. That will be the order of the Court.

## ARGUMENT

### SPECIFICATIONS OF ERROR NOS. 1, 2, AND 3

As Specifications of Error Nos. 1, 2 and 3 all deal with question No. 1, as stated above, to-wit: did the mailing of the letter to the above named addressees constitute a violation of the above statute, and challenge the sufficiency of the indictment as amended by the evidence, in the interest of time, space and economy, all specifications will be discussed together.

Taken as a whole, the letter conveys to one Milton Fardon the information that the defendant has had illicit relations with one Verne Thornquist, an acquaintance of Mr. Fardon, and warns him of the designs that might be worked upon him. (R. pp 8-9) Fardon is a 43 year old man; he served as a policeman in the City of New York for twenty years; he was married thirteen years and divorced five years prior to the trial (R. pp. 75 to 79). A copy of the letter was sent to Evelyn Nelson, secretary to the employer of Verne Thornquist. At the time of trial, Evelyn Nelson was married and had been for the two years prior. (R. p. 100) The letters were written during a period when the defendant was under high emotional strain caused by the activities of Verne Thornquist seeking to effect an estrangement between the defendant and his wife, as explained by the defendant (R. pp. 180 et seq.) and the defendant's wife (R. 146 et seq.), which testimony

stands corroborated (R. p. 158) and otherwise undisputed in the record. The defendant and his wife had been married since August 20, 1926, and, except for the temporary estrangement effected by Mrs. Thornquist, had continuously lived together as husband and wife (R. p. 146). The defendant was forty-three years of age at the time of trial, was an accountant and had been employed during most of his working years at the National Bank of Commerce in Seattle (R. p. 180). He was a dependable, trustworthy employee of good character and enjoyed a good reputation. (R. pp. 166 et seq.) (R. pp 140 et seq.)

It is significant that Verne Thornquist did not testify.

Written under emotional stress, certain words taken apart from the entire content of the letter appear on their face to be vulgar and crude. We respectfully contend that, taken as a whole, under the circumstances of this case, contained in a private sealed letter rather than a general publication, the writings did not and in law could not have the effect prohibited by the statute—of depraving and corrupting the morals of the persons into whose hands they were sent.

As stated in *Knowles vs. United States* (8 Circ.) 170 Fed. 409 at page 412:

“The true test to determine whether a writing comes within the meaning of the statute is whether



its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands it may fall, by arousing or implanting in such minds, obscene, lewd or lascivious thoughts or desires.”

The law does not seek or purport to outlaw certain words. There is no word or phrase that cannot be transmitted through the mails if the circumstances justify it, or if the conveyance of such words do not effect the prohibited result. Counsel intends to transmit this brief through the mails, containing the words here at issue; this action is justified by the circumstances. No one would doubt that a similar matter might be submitted through the mails to a doctor, psychiatrist or law enforcement agency without violation of the statute. We submit that it is only when such words are submitted to persons whose minds and morals might be adversely affected, or broadcast in such manner that it would be presumed that the writing would fall into the hands of impressionable persons, that the statute is violated.

In this case the two sealed letters were sent to the two above named persons. There is the highest presumption that a letter deposited in the United States Mail will be received by the addressee and no other. In this case there was no proof, and under the evidence there could be no presumption that the letter had or

could have had any adverse effect upon the morals of the addressees.

In the case of *Swearingen vs. United States*, 161 U. S. 446, 16 S. Ct. 562, 40 L. Ed. 765, the court considered an article contained in a newspaper of general circulation to the effect that a named person was, amongst other things "a mental and physical bastard, a black hearted coward, a liar, perjurer and slanderer, who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Savior. Time and again has he been proven a wilful, malicious and cowardly liar." In reversing the conviction, the Court said:

"The offense aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter to corrupt the morals of the people. The words 'obscene, lewd and lascivious' as used in the statute signify that form of immorality which has relation to sexual impurity and have the same meaning as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.

"Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall."

In the case of the *United States vs. Barlow*, D. C. Utah, 1944, 56 Fed. Sup., 795, (appeal dismissed, 65 S. Ct. 25, 323 U. S. 805, the Court considered a publication of general circulation advocating celestial or plural marriage, and the Court said:

“The Supreme Court passed upon this same statute later in *United States vs. Limehouse* 285 U. S. 424, 52 S. Ct. 412, 76 L. Ed. 843, wherein the defendant was charged with sending out certain filthy letters and writings through the mails, containing charges of sexual immorality and miscegenation and similar practices. The court found the language was coarse, vulgar and unquestionably filthy within the popular meaning of that term, and following the *Swearingen* case, *supra*, held that in order to constitute a crime the language must be “calculated to corrupt and debauch the minds and morals of those into whose hands it might fall.

In *McKnight v. United States*, (9 Cir.) 78 Fed. 2d, 931, it was held (syl. 2) ‘The court in considering indictments under the statute prohibiting mailing of libelous and indecent matter must first determine as a matter of law whether writing complained of could by any reasonable judgment be held to come within prohibition of the law, and the statute, being penal must be strictly construed.’

“In conclusion, it might be said that the natural reaction to reading a publication setting forth that polygamy is essential to salvation is one of repugnance and does not tend to increase sexual desire or impure thoughts.”

It was not proved that the act charged in the indictment came within the ban of the statute.

There is no allegation and no proof was offered to

show that the letter was of such a character as to corrupt the morals of the addressees—the only persons who might receive the letters.

The Courts have recognized that certain publications or writings, if published only to selected persons, would have no tendency to deprave or corrupt, but if distributed generally, might fall into the hands of persons who might be corrupted. In the former case, no offense is committed; in the latter, mailing would constitute a violation. It is, therefore, incumbent upon the government to prove that the act charged comes within the ban of the statute. In *U. S. vs. Dennett*, (C.C.A. 2d, 1930), 39 Fed. (2d) 564, in which the charge was based on the mailing of a pamphlet designed for the instruction of children in sex matters, the Court said:

“In other words, a publication might be distributed among doctors or nurses or adults in cases where the distribution among small children could not be justified. The fact that the latter might obtain it accidentally or surreptitiously, as they might see some medical books which would not be desirable for them to read, would hardly be sufficient to bar a publication otherwise proper.”

This case was cited with approval by the 9th Circuit Court of Appeals in *McKnight vs. U. S.* 78 Fed. (2d) 931, 933.

The distinction between printed publications and private sealed letters was clearly pointed out by the



Court in *U. S. vs. Wroblenski* 118 F. 495; the district judge observed:

“If it were a publication, or a matter were sent to a young person or a stranger, I am not sure that these definitions would exclude the language or suggestion of the letter. But I am of the opinion that the general test is not applicable alike to publications and sealed private letters. In either case the question of violation of the statute rests upon the import and presumed motive, and not upon the mere terms of the communication. Thus its tendency depends upon circumstances, and unexceptionable language may convey vicious information within the statute . . . In the case of a private sealed letter, there is no publication and no presumption arises of intention to give publicity, or that it will be read by others than the addressee. The language or communication may be free from the condemnation of the statute in one instance, while it would clearly fall within it when addressed to other persons. So the inquiry as to the tendency of the letter must be narrowed to its liability to corrupt the addressee, and no such tendency can be imputed to this letter to the mother of the defendant.

“The motion to quash the indictment must be sustained accordingly.”

In this case there was no showing and it could not be presumed from any showing made that the morals of the two addressees were in any manner effected, certainly not rendered in danger of corruption by the acts of defendant. The charge has not been sustained.

The letter is to be judgment by its effect as a whole.

It is well settled that a document is to be judged



in accordance with its dominant effect, and not merely by isolated words or passages. Thus a document or book when considered as a whole might be perfectly proper, yet contain several words or passages which taken by themselves would be considered indecent or obscene. In such cases, the document or book is characterized by its dominant effect, and not by the isolated words or passages.

*U. S. vs. One Book Entitled Ulysses* (C.C.A 2d, 1934), 72 Fed. 2d 705, 708

*Parmelee vs. U. S.*, (App. D. C. 1940), 133 Fed. 2d 729

*Walker vs. Popenoe* (App. D. C.) 149 Fed. 2d, 511, 512.

Taken as a whole, the letter is not within the prohibitions of the statute.

## SPECIFICATION NO. 4

It was error for the Trial Court to refuse to admit the testimony of the two addressees, under cross-examination, as to the effect the letters had upon them.

During cross-examination, the addressee, Fardon, was asked (R. p. 79) :

Q. When you received this letter, what effect did it produce upon you? State your reactions to the letter.

In the absence of the jury, the witness was permitted to answer in order that an offer of proof could be properly made. The testimony was then considered an offer of proof. (R. p. 120)

(Testimony of Milton Fardon.)

The Court: For the purpose of advising counsel what proof will be available for his offer, the Court permits counsel to make the inquiry and will postpone [62] the ruling of the offer until the offer is made, This is, as I understand it an investigation to see what he will have available for offering. You may answer the question.

The Witness: I don't know—I was deeply surprised, deeply puzzled, perplexed, at receiving a letter from a man whom I had never seen in my life.

Q. It had no other effect on you?

A. Yes, it did have an effect. As a matter of fact,

I thought it was pretty crude of a man to write that kind of a letter about any woman, regardless of the justification, circumstances or anything else, a very poor specimen of a man.

Q. Did it have any other effect?

A. Well, we could go on and on with this. A man who could write a letter like that could be—oh, I guess, subjected to a very lengthy criticism.

Q. So far as you are concerned, you have expressed it—in other words, you thought that you were surprised and puzzled and you felt that it wasn't the sort of letter that a man should write?

A. Definitely not.

Q. And that about summarizes the effect that it had upon you.

A. In a way, yes. [63]

Q. And it had no other effect or different effect?

A. I just don't quite clearly understand that question.

(Testimony of Milton Fardon.)

Q. If it produced any other effect upon you, I want to know what it was.

A. Generally speaking, no.

Following refusal to admit similar testimony of the addressee, Nelson, the following offer of proof was made: (R. p. 116)

Mr. Turner: I offer to prove by the witness, Evelyn Nelson, that upon receipt of this letter she was shocked and disgusted and felt that the letter was insulting, and that the letter produced no other effect on her.

The Court: Is there any objection?

Mr. Evans: I would object to that proof being presented to the jury, Your Honor, as being irrelevant and immaterial and not part of the issues of this case.

The Court: The Court sustains that objection.

In view of the authorities above cited, we respectfully submit that the defendant was entitled to have this testimony before the jury and that its rejection denied him a fair trial.

Respectfully submitted,

ALLAN POMEROY

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Seattle, Wash.

IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

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ERNEST VERNER,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,  
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HONORABLE JOHN C. BOWEN, *Judge*

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**BRIEF OF APPELLEE**

---

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OFFICE AND POST OFFICE ADDRESS:  
1017 UNITED STATES COURT HOUSE  
SEATTLE 4, WASHINGTON





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IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

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ERNEST VERNER,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

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HONORABLE JOHN C. BOWEN, *Judge*

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**BRIEF OF APPELLEE**

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**JURISDICTION**

The defendant was charged in an indictment containing two counts with violating Section 1461, Title 18, U.S.C. He was tried and convicted on both counts in the District Court for the Western District of Washington, Northern Division. The statutes au-

thorizing review by this court are set out on page 2 of appellant's brief.

## STATEMENT OF THE CASE

In Count I of the indictment the defendant is charged with having knowingly mailed a lewd, lascivious and filthy letter to Milton Fardon. In Count II the defendant is charged with having mailed a carbon copy of the same letter to a Miss Evelyn Nelson. A photostat copy of the letter was furnished the appellant upon demand by way of bill of particulars. (T.R. 8). At the time of the trial, both of the letters were introduced in evidence. (Ex. 3, T.R. 73, Ex. 5, T.R. 98). The defendant admitted in a signed statement he had prepared and mailed the letters (Ex. 1, T.R. 105) and also admitted these facts upon being examined as a witness. (T.R. 212 and 213).

The letter which is alleged to be lewd, lascivious and filthy contains seven paragraphs plus a one-sentence postscript. The first two paragraphs explain the writer's past relationship with a certain named woman. In the third, <sup>and fifth</sup> and fourth paragraphs, the writer brags of his illicit sexual relations with the named woman and gives information as to her weakness for such. In the sixth paragraph, using the language

of the street, the writer praises the woman's ability in the performance of such activities and invites Milton Fardon to "be sure and get your share." In the last paragraph and the postscript the writer makes degrading remarks about the named woman and accuses her of sexual immorality.

The appellant was a stranger to both of the recipients of the letter, having neither met nor had any prior communication with either.

### QUESTIONS RAISED

The appellant raises two questions on appeal.

1. Are the letters lewd, lascivious and filthy within the meaning of the statutes?
2. Is the effect of such a letter upon a recipient material to the issues raised in the indictment?

### SPECIFICATIONS OF ERROR

The appellant sets out four specifications of error in his brief on pages 4 and 5. The first three are directed to the first question above stated and the fourth is directed to the second question above stated.

## ARGUMENT

### 1. ARGUMENT ON SPECIFICATIONS OF ERROR 1, 2 and 3.

## SUMMARY

The tenor of the entire letter is offensive to the common sense of decency and modesty of the community and tends to suggest immoral thoughts. The sixth paragraph of the letter being an invitation to Milton Fardon to engage in illicit sexual relations with the named woman is clearly within the letter and spirit of the statute and the interpretation thereof by the courts. The recipients of the letter being strangers to the appellant, there can be no claim of privilege merely because the envelopes were sealed.

## ARGUMENT

In arguing the first three specifications of error, the appellant states that one of the recipients of the letter, Milton Fardon, was 43 years old, had served as a policeman for 20 years in New York City and had been married for 13 years but is now divorced. Appellant also states that the other recipient, Mrs. Evelyn Nelson, was a secretary to an employer and had been married for two years.

Apparently, the appellant either seeks to con-

vince this court that persons who have had such experiences are incapable of being further debauched and corrupted or that they are so high minded that no amount of lewd and lascivious literature could ever corrupt and debauch their minds and morals. Neither proposition has any merit. Nor does the appellant's previous good character or emotional strain in any way alter the crime committed by him. The only issue to be decided is whether the jury was entitled to find, as it did, that the letter was in fact lewd, lascivious and filthy as defined by Section 1461, Title 18, U.S.C. The authorities which will be hereinafter cited are in accord on the proposition that language which is calculated to corrupt the minds and morals is lewd, lascivious and filthy within the meaning of this statute. Paragraph 6 of the letter encourages and invites Milton Fardon to indulge in illicit sexual relations with the named woman. It is difficult to conceive how language could more clearly fit the Supreme Court's definition of lewd, lascivious and filthy than that used in this sixth paragraph.

Appellant seeks to justify the sending of the letters through the mail as a privileged communication merely because the envelopes in which the letters were placed were sealed. The appellant was a complete stranger to both of the recipients of the letters.



Nowhere in the record or in the appellant's brief is there any explanation as to how such privilege could be established. The appellant cites the case of *Swearingen v. United States*, 161 U.S. 446, 16 S.Ct. 562, 40 L.Ed. 765. In that case the lower court found as a matter of law that the language was obscene, lewd and lascivious, and allowed the jury to only determine the questions of whether or not the defendant had knowingly mailed the paper in question. The Supreme Court held that the particular language which was used was not a matter of law, lewd and lascivious, then defined the meaning of those words in the following language:

“The offense aimed at, in that portion of the statute we are now considering, was the use of the mails for delivering matter to corrupt the morals of people. The words ‘obscene’, ‘lewd’ and ‘lascivious’ as used in the statute signify that form of immorality which has relation to sexual impurity and have the same meaning as given them in common law for prosecutions for obscene libel.”

The whole tenor of the letter in the case at hand is to invite Milton Fardon or anyone else into whose hands the letter might fall to engage in illicit sexual relations with the woman named in the letter. This is exactly the type of thing the Supreme Court has stated the statute is designed to punish and prevent.

In *United States v. Limehouse*, 285 U.S. 424, 52

S. Ct., 412, 76 L.Ed. 843, the *Swearingen* case is approved in the following language:

“In *Swearingen v. United States*, decided in 1896, the indictment was under Revised Statutes Sec. 3893, which made unmailable only ‘obscene, lewd, or lascivious’ matter. This Court, being of opinion that those words should be given the meaning attributed to them at common law in prosecutions for criminal libel, directed that the judgment of conviction be reversed, because the language used was not ‘calculated to corrupt and debauch the mind and morals of those into whose hands it might fall’ and induce sexual immorality. 161 U.S. at 451.”

On December 28, 1949, the Court of Appeals for the Ninth Circuit, in a very learned decision, considered and defined the words “lewd” and “lascivious” in the case of *Burnstein v. United States*. The opinion in this case approves the following two instructions which were given by the lower court as being the rule in the Ninth Circuit:

“Matter is obscene, lewd, or lascivious, within the meaning of the quoted statute, if it is offensive to the common sense of decency and modesty of the community, and tends to suggest or arouse sexual desires or thoughts in the minds of those who by means thereof may be depraved or corrupted in that regard. The true inquiry in this case is whether or not the publication charged to have been obscene was in fact of that character, and if it was, and the defendant knew its contents at the time he deposited it in the mail, it is not material that he, himself, did not regard it as obscene.

"You are instructed that the words 'obscene, lewd, or lascivious', as used in the statute from which I have just quoted to you, have the meaning of that which is offensive to chastity and modesty. They mean that form of indecency which is calculated to promote the general corruption of morals. The true test to determine whether a writing is non-mailable as obscene, lewd, or lascivious is whether its language has a tendency to deprave or corrupt the morals of those whose minds are open to such influences and into whose hands it may fall by allowing or implanting in such minds obscene, lewd, or lascivious thoughts or desires."

The two letters which the appellant herein deposited in the mails clearly fall within the definition of "lewd" and "lascivious" as set out in these instructions. The tenor of the entire letter has a tendency to deprave or corrupt the morals of those whose minds are open to such influences.

The appellant's contention that the letter was privileged merely because it was mailed in a sealed envelope will now be considered. The appellant cites *United States v. Dennett*, 39 F. (2d) 564 (D.C.A. 2) 1930, and quotes the following from the decision therein:

"In other words, a publication might be distributed among doctors or nurses or adults in cases where the distribution among small children could not be justified. The fact that the latter might obtain it accidentally or surreptitiously, as they might see some medical books which would

not be desirable for them to read, would hardly be sufficient to bar a publication otherwise proper."

The publication which was being considered in that case was a pamphlet on sex education. The letter in this case can in no wise be considered justified as an educational manuscript.

The appellant further cites *United States v. Wroblenski*, 118 Fed. 495. The first sentence of the quotation from that case clearly distinguishes it from the case at hand, "If it were a publication or matter sent to a young person or to a *stranger* I am not sure that these definitions would exclude the language or suggestion of the letter." (Italics supplied).

In the case at hand, the persons to whom the letters were sent were total strangers to the appellant. Therefore, the Wroblenski case is not in point at all.

The appellant's first specification of error: "The District Court was in error in overruling the defendant's motion for dismissal of the indictment" is not specifically urged in the appellant's brief. Although the record does not specifically show that the appellant's motion to dismiss the indictment was overruled, such is the fact. This, of course, is evidenced by the fact that a trial was had. There can be no



honest dispute that the wording of the indictment does not state a crime.

The second and third specifications of error are challenges to the sufficiency of the evidence at the close of the Government's case and again at the close of all the evidence. As the authorities cited herein clearly hold, it was incumbent upon the trial judge to submit the case to the jury, under proper instructions. There has been no challenge to the instructions. The reason for this undoubtedly lies in the fact that the trial judge gave virtually all of the instructions requested by the appellant as well as those which are indicated by the cases decided in the Supreme Court of the United States. The appellant having openly admitted all elements of the crime except the averment that the letter was lewd, lascivious and filthy, the only real question for the jury to determine was whether or not the letter fell within such definitions. The jury having decided this question against the appellant, it would not be proper to set aside that verdict.

## 2. ARGUMENT ON SPECIFICATION OF ERROR No. 4.

### SUMMARY

The proper test of whether or not language is lewd, lascivious and filthy is whether or not it is



calculated to corrupt and debauch the minds and morals of those into whose hands it might fall. This test is to be applied by the jury considering the language itself. The question of whether or not the minds of the recipients of the letter were actually corrupted and debauched is therefore not a material issue in this case.

## ARGUMENT

In the fourth specification of error the appellant contends that the court erred in refusing to allow the appellant to cross-examine each of the recipients of the letter on the question of whether or not their minds and morals were debauched and corrupted by virtue of having read the letter. The appellee contends the evidence sought to be proven by appellant is not material and that the trial judge committed no error in so refusing to allow the appellant to proceed in this manner.

In Specification of Error No. 4, the appellant sets out an offer of proof as to the reactions of Milton Fardon upon receipt of the letter. Appellant, by such proof, sought to introduce evidence that the mind and morals of Milton Fardon had not been corrupted, depraved or debauched by reason of having received the letter. The appellant, by so doing, sought to con-

vince the jury that, since the recipient of the letter had not been harmed, no crime had been committed.

If the appellant's theory were followed, then anyone could mail lewd, lascivious and filthy matter with impunity to a person whose mind and morals were already debauched to the maximum. Likewise, under the appellant's theory there would be no crime if one were to mail lewd, lascivious and filthy letters to a person who was so high minded and whose moral fiber was so strong that no amount of such literature could corrupt and debauch his mind or morals.

The statute which the appellant is accused of having violated prohibits the use of the United States mails for transmitting lewd, lascivious and filthy letters. The issue to be decided by the jury was whether or not the particular letter in this case was lewd, lascivious and filthy. The definitions of these words have been defined by the Supreme Court and by this Court. These definitions were given to the jury in the instructions. The opinion of the recipient of such a letter is not material on the question of whether or not the letter is actually lewd, lascivious and filthy. It is therefore, the appellee's contention that such evidence as the appellant sought to present is not competent or material and the trial judge correctly excluded such evidence.

Further, according to the appellant's theory, a defendant charged with violating Section 1461 could never be convicted unless the recipient of the objectionable letter took the stand and testified that as a result of having received the letter his mind and morals had become debauched and corrupted.

In *Rosen v. United States*, 161 U.S. 29, 16 S. Ct. 434, 40 L.Ed. 606, the court stated as follows:

"The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time, of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated. Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, chastity in social life, and what must be deemed obscene, lewd, and lascivious."

See *Magon v. U. S.* (9 Cir.) 248 F. 201, to the same effect.

Since the sender's opinion as to whether or not language is lewd and lascivious is not the proper test under the statute, then how can the recipient's opinion be of any probative value in determining the question involved.

In the case of *Burnstein v. United States* decided by the Court of Appeals for the Ninth Circuit on December 28, 1949, the defendant used the mails for circulating an advertisement as to the contents of an obscene book. Certainly, no one would have ordered the book from the defendant unless they had a desire to read it. No one who ordered and read the book testified that their morals and minds had been corrupted and debauched, yet this court sustained the conviction.

In the *Burnstein* case this court ruled that the jury had the responsibility of determining whether or not the language used in the writing was offensive to the common sense of decency and modesty of the community. The case further holds that it is not material whether the sender himself regarded the language as objectionable under the statute. It being the jury's duty to determine such questions under proper instructions, it would likewise be immaterial whether the recipient considered the language non-mailable within the definition set out in the statute.



In the case of *United States v. Musgrave*, 160 Fed. 700, the defendant sought to defend upon the same ground as the appellant contends here, that is, that unless the recipient's mind and morals were corrupted and debauched no conviction could stand. The Court stated on page 704:

"To sustain the contention of defendant would necessarily require the court to insert in the act an exception which Congress has failed to make. It would necessitate in almost every case a determination of the moral or mental condition of the addressee of every obscene matter sent through the mails, and, as stated by the assistant district attorney, 'the jury would have to determine in every case whether the mind of the receiver of the letter could be corrupted, and an acquittal would result if the addressee were a woman of the town, were insane, were so high minded as not to be influenced by letters of this character, were of such immature years as not to understand the import of the words, were so depraved that he could sink no lower.' A prostitute's mind, or that of a degenerate, may not be open to any immoral influences, and the receipt of a lascivious or lewd letter, book or picture may not corrupt their minds because they are beyond such influences. Would that fact be a defense to a prosecution under this statute? Would the fact that a person, while away from home, purchases a lascivious book or picture, and sends it through the mails addressed to himself at his home, exempt him from prosecution under the statute? Clearly not. Or if publishers of such literature should use the mails for the purpose of sending it to retail dealers, who may have no intention of reading it,



and whose minds for this reason could not be corrupted, but merely sell it, could it be successfully claimed that such acts would not be violative of the statute? Congress has prohibited the sending of lottery tickets through the mails. Can a husband send such a ticket to his wife through the mails and still not be amenable to the law, or send to his wife an article intended for the purpose of preventing conception or procuring an abortion, which is prohibited by the same act? In the opinion of this court the language used clearly and convincingly shows that the intent of Congress was to prevent the abuse of a great privilege granted by a magnanimous government for the purpose of promoting the welfare and intelligence of its people, and not permit it to become a 'vehicle for the transmission or circulation of mental filth'."

And on page 706 the opinion states:

"Applying these rules, it clearly appears that the object of Congress in enacting the statute was to absolutely prohibit the use of the mails to all persons for the transmission of matters which are lewd, lascivious, or indecent. It matters not what the relationship between sender and sendee is, or what the effect of the receipt of the article sent may have on the mind of the particular person to whom it is sent. If it is of such a nature that the reading would, in the opinion of reasonable persons, or the jurors selected to try the case, have a tendency to deprave or corrupt the minds of reasonable persons and would suggest to the minds of either sex thoughts of an impure or libidinous character, it is within the prohibition of the statute."

The Musgrave case was cited with approval by the

9th Circuit Court of Appeals in *Magon v. United States*, 248, Fed. 201.

In the case *United States v. Bebout*, 28 Fed. 522, the court stated:

“The statute does not make the publication of obscene and indecent matter an offense. It consists in using the United States mails for its circulation. It is not designed or intended to prohibit the publication of obscene matter, but only to prohibit and prevent its circulation through the mails. Nor does the statute make a purpose or intent to deprave or demoralize the public, or injure individuals, an ingredient to constitute the offense. Nor does the truth or falsity of the publication make any part of the offense; the only inquiry being, was the publication obscene or indecent, and was it placed in the mails for circulation in violation of the statute?”

## CONCLUSION

The indictment having stated a violation of the statute, and the evidence adduced at the trial, which, if believed, being sufficient to sustain the charges in the indictment, the Court committed no error in overruling the appellant's motion to dismiss the indictment nor in overruling the appellant's motions for a judgment of acquittal. The question of whether or not the language in the letter was lewd, lascivious and filthy, being an issue to be decided by the jury under proper instructions, the actual effect of such a letter upon a recipient is not material to the issues of the case, and the court made no error in excluding such evidence.

Respectfully submitted,

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UNITED STATES  
COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ERNEST VERNER,

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VS.

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*REPLY*  
**BRIEF FOR APPELLANT**

APPEAL FROM THE UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

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UNITED STATES  
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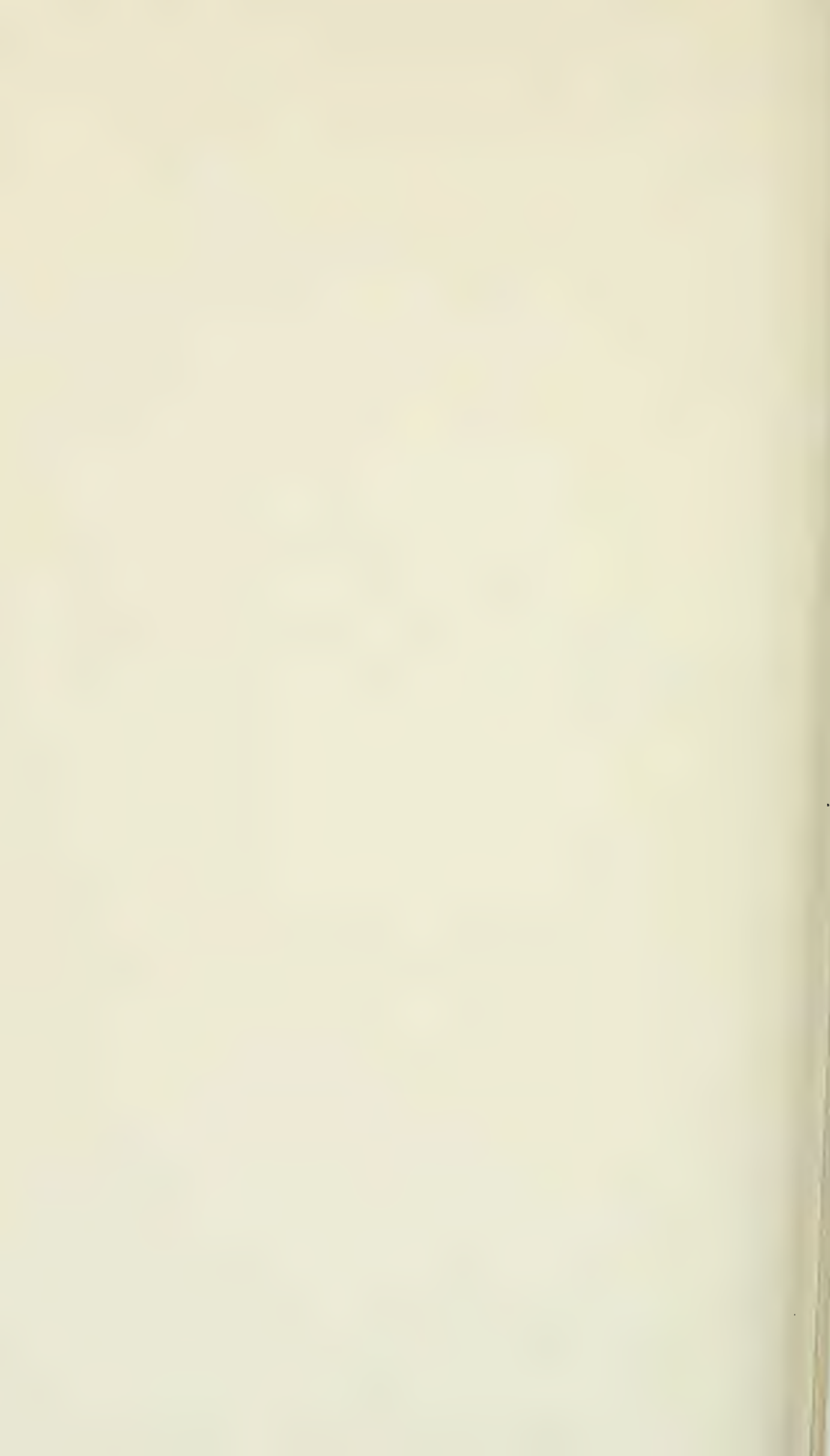
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## CASES CITED

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## REPLY BRIEF

Appellee bases its case on two assumptions of fact which are not borne out by the record in this case:

1. That the language of the letter was an invitation to the addressee to engage in an immoral act.
2. That the addressees were strangers to the defendant.

FIRST: To support the first contention, that the language of the letter was designed to "Encourage Milton Fardon to indulge in sexual relations with the named woman." as stated on page 5 of appellee's brief, one sentence of the letter is taken out of context. Read in its entirety and considered as an entirety in accordance with the established rules of construction, the letter has just the opposite meaning and effect. It is a warning. It was conceived and designed as an admonition to Milton Fardon to do just the opposite thing: to abstain from such relations.

The woman concerning whom the letter was written had pursued the defendant. As a result his home had been broken for a time. He decided to abandon the illicit enterprise with her and she refused to give him up. She pursued him to his home at various times, followed the defendant and his wife in her car, called on his wife demanding that he be given up to her until (R. p. 212)

"A. On that Sunday in October when we definitely decided to come to an end of it, I told her



once and for all that I would expose her as to just what she was and that was what I tried to accomplish. Everything else had failed, the courts had failed, everything else had failed."

If one were contemplating a dangerous journey and a letter were written to him first outlining the dangers, the experiences of the writer, and then stating "A word to the wise is sufficient and if you see fit to go, be sure and travel fast." The sentence taken out of context would indicate that the writer were encouraging the journey; the entire letter has a positive effect to the opposite end.

SECOND: It is true that the addressees testified that they did not know the defendant, that they were never socially acquainted with him.

The important consideration in this case is that the defendant knew of the addressees, knew who they were and had a very definite and limited purpose in writing the letters. The letters were not written to debauch the minds of two unknown persons, but to definitely expose one certain individual to another man who was then keeping company with her and with the secretary of the individual's employer. This is not a libel suit and no reference to a claim of privilege is made by appellant. This point is made only, in this criminal proceedings, to show the lack of criminal intent and that the words sent through the

mails were not "calculated to corrupt and debauch the mind and morals of those into whose hands it might fall." as stated in the *Swearingen* case relied on by appellant.

THIRD: The Swearingen case is still the recognized law on the subject involved in this appeal.

In *U. S. vs. Jesse Miller Sinclair*, (C.C.A. 3d, 1949), 174 Fed. (2d) 933 the defendant was convicted in the district court, on the charge of sending an obscene, lewd and lascivious letter to his wife through the mails. The circuit court in the above memorandum opinion sustained the conviction. On *Certiorari*, the Supreme Court reversed the decision with the following comment: (94 L. Ed. Adv. Opinions, 256)

"January 9, 1950, *Per Curiam*. The Judgment is reversed. *United States vs. Limehouse*, 285 U. S. 424, 76 L. Ed. 843, 52 S. Ct. 412; *Swearingen vs. United States*, 161 U. S. 442, 40 L. Ed. 765, 16 S. Ct. 562.

Respectfully submitted,

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